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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LUIGINO'S, INC.,

Petitioner,

v.

IBP, INC. and ROBERT PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit, by weighing the evidence and failing to draw inferences in favor of the nonmoving party, on a motion for summary judgment in a case based in large part on the knowledge and intent of the Defendants, deprived the Petitioner of its Seventh Amendment constitutional right to a jury trial, its due process right to confront and cross-examine adverse witnesses, and violated the requirements of the 1986 trilogy of cases

2. Whether the United States Supreme Court should exercise its supervisory powers over the Courts of Appeals in order to harmonize the existing inconsistency in the application of the 1986 trilogy of cases.

3. Whether the Court of Appeals for the Eighth Circuit improperly failed to shift the burden of proof to IBP, Inc. and Robert Peterson to establish that there was no genuine issue of material fact as to whether Peterson at all times acted in good faith toward Luigino's, as required by the 1986 trilogy of cases.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

Petitioner: Luigino's, Inc.

Pursuant to Sup. Ct. R. 29(6), Luigino's, Inc. hereby certifies that it is a privately held Minnesota corporation.

Respondents: Robert Peterson and IBP, Inc.

Pursuant to Sup. Ct. R. 29(6), Luigino's, Inc. hereby states that, in its Corporate Disclosure Statement dated March 8, 2002, and filed with the Circuit Court of Appeals for the Eighth Circuit, IBP, Inc., certified that "Tyson Foods, Inc., a publicly held, Delaware corporation, owns ten percent or more of the stock of IBP, Inc. Tyson Foods, Inc., is the only parent of IBP, Inc."

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IBP, INC. and ROBERT PETERSON,

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On Petition For Writ Of Certiorari To The
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Petitioner, Luigino's, Inc. ("Luigino's"), by its undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The reported opinion of the Court of Appeals for the Eighth Circuit upon which this Petition is based can be found at *Luigino's, Inc. v. Peterson*, 317 F.3d 909 (8th Cir. 2003). App. 1a.

The opinion of the United States District Court for the District of Minnesota can be found at *Luigino's, Inc. v. Peterson*, 2002 WL 122389 (D. Minn. January 28, 2002). App. 14a.

JURISDICTION

The United States District Court for the District of Minnesota had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1). The Court of Appeals for the Eighth Circuit had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1291. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT AUTHORITY INVOLVED

U.S. Const. Amend. VII. App. 43a.
Fed. R. Civ. P. 38(a) App. 44a
Fed. R. Civ. P. 56. App. 45a.
Minn. Stat. § 325C.01. App. 48a.
Minn. Stat. § 325C.02. App. 50a.
Minn. Stat. § 325C.03. App. 51a.

STATEMENT OF THE CASE

A. General Background and Description.

Luigino's is a Minnesota corporation that manufactures and sells branded frozen entrées at retail in supermarkets and grocery stores across the United States, Canada, the United Kingdom, Australia, and parts of Europe and South America. These frozen entrées are sold under the name "Michelina's." There are over 200 types of Michelina's frozen entrée products, ranging from macaroni and cheese to the "Yu Sing" Chinese frozen entrées. These products are sold in the frozen food aisle, typically in the "frozen dinner" or "frozen entrée" section, of supermarkets and grocery stores. Jeno Paulucci, an entrepreneur from Duluth, Minnesota, created Luigino's in 1990 and is the Chairman of Luigino's' Board of Directors.

In 1997, Mr. Paulucci considered selling Luigino's. IBP, Inc. ("IBP") evidenced significant interest in purchasing the company. In 1998, IBP was a $13 billion a year producer of fresh meat products and, through its subsidiaries, manufactured and sold other food products, primarily in the

"foodservice" channel of distribution, which involves the manufacture of food items for restaurants, cafeterias, and similar outlets. Although one of IBP's subsidiaries produced low-end, frozen hand-held Mexican food products, which were primarily sold in foodservice and convenience stores, neither IBP nor any of its subsidiaries was producing any retail branded frozen entrées for sale in grocery stores or supermarkets—Luigino's' market. Robert Peterson ("Peterson") was IBP's Chief Executive Officer.

B. Relationship Between Luigino's and IBP.

In February, 1998, IBP entered into a "Confidentiality Agreement" so that IBP could examine Luigino's more closely and determine if IBP wished to acquire Luigino's. Peterson and IBP repeatedly represented that IBP was not in the branded frozen retail entrée business and did not directly compete with Luigino's' Michelina's products. Ultimately, IBP offered to pay $450 million to acquire Luigino's, but a transaction was never consummated.

Presuming that a transaction was still possible, Mr. Paulucci asked Peterson to serve on Luigino's' newly formed Board of Directors. Peterson accepted and became a Luigino's Director in January of 1999, and was subsequently appointed Vice-Chairman in July of 1999. Peterson admitted during discovery that he owed a fiduciary duty to Luigino's. Peterson, however, did not join Luigino's Board to further Luigino's' best interests. Rather, Peterson admitted in his deposition that he was on the Board as a representative of, and for the benefit of IBP, to find out more about Luigino's.

C. Howlin' Coyote.

During his tenure at Luigino's, Peterson became privy to Luigino's' highly confidential, detailed plans to introduce a line of premium Mexican/Southwestern frozen entrées known as Howlin' Coyote. Such plans included (1) a description of the market segment in which Howlin' Coyote

would be competing, which was a sub-segment of Mexican food; (2) Luigino's' strategy to penetrate the Mexican market using the Howlin' Coyote concept, and future expansion within the market; (3) a determination of the packaging and specific product SKU's; (4) an identification of the target market, and the consumers that were purchasing frozen Mexican food; (5) identification of the existing void in the market for premium Mexican products, which Howlin' Coyote was designed to fill; and (6) the favorable acceptance Howlin' Coyote received from consumer focus groups.

The information Peterson acquired while on Luigino's' Board was highly sensitive, confidential, and included trade secrets that Luigino's would not have disclosed to a competitor. Although Peterson testified in deposition that he did not disclose anything about Howlin' Coyote to anyone at IBP, IBP's CFO testified in deposition that Peterson told him about Luigino's' Howlin' Coyote line of products, thereby creating a credibility issue on a very material issue of fact.[1]

Luigino's introduced Howlin' Coyote into various test markets in the United States in the Fall of 1999. In January of 2000, unaware of IBP's imminent competitive threat, Luigino's decided not to expand its sale of Howlin' Coyote into additional markets, but continued to market and sell Howlin' Coyote in the existing test markets.

D. José Olé.

In 1998 and 1999, IBP, through one of its subsidiaries,

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[1] The clear inconsistency between Peterson's testimony and the testimony of IBP's CFO, which directly refutes Peterson's testimony, would have caused a reasonable juror to question IBP's contention that it did not use Luigino's confidential information or trade secrets relating to Howlin' Coyote. Luigino's had no opportunity to cross-examine Peterson in open court, to have a jury see Peterson's face, to appraise his demeanor and physical movements, or to perceive the indicia that are relied upon to evaluate the credibility of a witness.

was developing the "José Olé" product line, which, at that time, was only intended to consolidate and repackage IBP's existing, low-end handheld Mexican products, which were sold in "foodservice channels" and markets other than the frozen entrée section of grocery stores and supermarkets. In mid to late 1999, while Peterson was on Luigino's' Board, IBP dramatically changed its prior strategy, and decided to re-formulate and launch José Olé as a line of high-end, Mexican/Southwestern frozen entrées, to be sold in the retail frozen entrée section of grocery stores and supermarkets.

In February of 2000, Peterson, as President of IBP, approved the disbursement of the very funds used to launch José Olé. Peterson approved such funding while he was Vice Chairman of Luigino's' Board, however, he withheld disclosure of these developments from Luigino's.

IBP launched José Olé in grocery stores and supermarkets in April of 2000. José Olé was often placed next to Luigino's' products in the frozen entrée section of grocery stores and supermarkets, and frequently it displaced Luigino's' products. In June of 2000, Luigino's stopped manufacturing and selling Howlin' Coyote.

E. The Instant Litigation.

In July of 2000, Luigino's brought an action in the United States District Court for the District of Minnesota against IBP and Peterson for (1) breach of contract; (2) breach of fiduciary duty; (3) constructive trust; and (4) misappropriation of trade secrets pursuant to Minn. Stat. §§ 325C.01 (App. 48a), 325C.02 (App. 50a), and 325C.03. App. 51a. Luigino's' claims for breach of fiduciary duty and constructive trust were based, *inter alia*, on the theory of corporate usurpation.[2] Luigino's later amended its

[2] During the litigation, Luigino's discovered that IBP's *modus operandi* was to steal that which they could not buy. There are at least two

Complaint to bring a claim for negligent misrepresentation.

During discovery, Luigino's uncovered additional evidence supporting its claim that IBP used information acquired from Luigino's to assist in the production, development, and sale of IBP's José Olé product line. That evidence included the following: (1) In October of 1999, within two months after Peterson was exposed to the trade secret information about Howlin' Coyote, IBP suddenly changed its previous position and decided to reformulate and expand its pending line of frozen premium Mexican products into retail distribution in the "home meal replacement" market category (i.e., retail frozen entrees) in grocery stores and supermarkets; and (2) In the spring of 2000, IBP launched its line of José Olé premium frozen Mexican products, which, in many instances, were placed side by side with Luigino's' Michelina's products in the frozen entrée section of grocery stores and supermarkets.[3] In many

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instances of such conduct. In a reported decision, the Federal Circuit, *inter alia*, affirmed a jury award of $10.9 million against IBP for its misappropriation of plaintiff's secret process for producing pre-cooked sausage. Despite IBP's claims that it had spent several years independently developing a similar process, a jury found that IBP actually misappropriated plaintiff's trade secrets and used them to develop its own process. *See C&F Packing Co., Inc. v. IBP, Inc.*, 224 F.3d 1296 (Fed. Cir. 2000). Similarly, in 1997, Foodbrands of America (now a subsidiary of IBP), sought to acquire Don Miguel, a manufacturer of, *inter alia*, frozen Mexican food. Don Miguel produced Lean Olé, whose registered trademark featured a picture of a Mexican man wearing a sombrero. After negotiations terminated, Don Miguel discovered IBP's plans for José Olé, featuring a logo nearly identical to the logo used by Lean Olé. Don Miguel initiated legal action against IBP, in the United States District Court for the Central District of California, *Don Miguel Mexican Foods, Inc. Specialty Brands, Inc., et al.*, Case No. CV00-5737 DDP (MCX), resulting in a confidential settlement.

[3] Luigino's' expert on the frozen food industry opined that it was reasonable to conclude that IBP used Luigino's' trade secrets and confidential information as a "platform" to accelerate the launch of José Olé. Thus, IBP became the "early starter" or "first mover" by using

instances, the new José Olé frozen entrees actually displaced Luigino's' frozen products from the grocery shelves. Importantly, several of the products in the José Olé line were literally identical to Luigino's' Howlin' Coyote products.

Despite Luigino's compelling circumstantial evidence, the District Court granted Peterson's and IBP's Motion for Summary Judgment and entered final judgment in their favor. App. 14a.

The Eighth Circuit affirmed the lower court's ruling, finding that Luigino's' evidence of IBP's alleged use of trade secrets or confidential information was not "sufficient to support an inference that IBP used Luigino's' confidential information . . . ." A timely filed Petition for Rehearing was denied. This Petition follows.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, BY WEIGHING THE EVIDENCE AND FAILING TO DRAW INFERENCES IN FAVOR OF THE NONMOVING PARTY ON A MOTION FOR SUMMARY JUDGMENT IN A CASE BASED IN LARGE PART ON THE KNOWLEDGE AND INTENT OF THE DEFENDANTS, DEPRIVED LUIGINO'S OF ITS SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL, ITS DUE PROCESS RIGHT TO CONFRONT AND CROSS EXAMINE ADVERSE WITNESSES, AND VIOLATED THE REQUIREMENTS OF THIS COURT'S 1986 TRILOGY OF CASES.

A. The time is ripe for this Court to exercise its supervisory powers over the federal courts in order to

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Luigino's' trade secrets and confidential information to penetrate more quickly a market in which it previously had no presence or experience.

> *eliminate, or at least reduce, the complete disarray and discord that characterizes the lower courts' summary judgment practice in the seventeen years since this Court's decisions in Matsushita, Anderson, and Celotex.*

In 1986, this Court decided three cases pertaining to summary judgment motions: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Since then, numerous district courts and courts of appeals, although paying lip service to the principles articulated in those opinions, have taken widely divergent positions regarding various aspects of their application. Moreover, in some cases, certain district courts and courts of appeals have flatly failed to apply the mandate of those cases. The instant case is an example of this phenomenon. It provides this Court an excellent vehicle for harmonizing summary judgment practice, resolving some of the ambiguities that have arisen since the trilogy, and assuring that Rule 56 and constitutional jury trial and due process principles are properly balanced.

When the trilogy was decided, three members of this Court accurately predicted that problems would arise in applying the decisions' mandates. Justice William Brennan opined, in the *Anderson* dissent, that it was difficult if not impossible to draw the line between impermissible weighing of the evidence and determining whether the evidence was sufficient to be presented to a jury. According to Justice Brennan:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that

> "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.*, the importance and value, of the evidence in light of the "quantum," *i.e.*, amount "required," could *only* be performed by weighing the evidence.

Anderson, 407 U.S. at 266 (Brennan, J., dissenting).[4] He further observed that if a trial judge weighed the evidence on a summary judgment motion, then "concerns are raised concerning the constitutional rights of civil litigants to a jury trial." *Id.* at 267. Finally, Justice Brennan predicted the difficulties that lower courts would face in implementing the principles articulated in *Anderson* when he stated that ". . . it is the district courts and courts of appeals that must struggle to clean up after us." *Id.* at 268.

Justice Brennan identified another critical issue concerning the moving party's burden in his *Celotex* dissent:

> [T]he Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. . . . This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion.

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[4] Numerous commentators have criticized the trilogy as inviting lower courts to weigh the evidence on summary judgment. *See, e.g.*, Daniel P. Collins, *Note, Summary Judgment and Circumstantial Evidence*, 40 Stan. L. Rev. 491, 501-504 (1988); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 137-140 (1988); Brain L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 Dick. L. Rev. 25, 35 (1989); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint, and the Manipulation of Jurisdiction*, 64 Notre Dame L. Rev. 321, 329 (1989).

Celotex, 477 U.S. at 329 (Brennan, J., joined by Burger, C.J., and Blackmun, J., dissenting). This passage is germane because IBP presented little evidence as the summary judgment movant. This case merits review because, among other reasons, it illustrates that these predictions have become realities and this Court should provide guidance to lower courts in applying Rule 56 more consistently, in striking a proper balance between the effective utilization of summary judgment, and the proper respect for litigants' right to have their grievances resolved by jury trial. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1090-93 (2003), available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf.

Every federal court recites the fundamental principles associated with summary judgment, as outlined in the trilogy. Summary judgment is only proper when no reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. A judge may not weigh the evidence. *Id.* at 249. The evidence of the nonmovant is to be believed. *Id.* at 255 All reasonable inferences must be drawn in favor of the nonmoving party. *Id.* The court may not make credibility determinations. *Id.* Although these statements are faithfully recited in innumerable judicial opinions, in many cases, those same courts do not follow them.

Several cases, including the instant case, demonstrate that courts are improperly weighing evidence, making credibility determinations, and drawing inferences against the nonmoving party—activities that violate the 1986 trilogy. In *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402 (6th Cir. 1991), for example, a retired director of a closely held corporation brought an action for fraud against the corporation and his brother, another director of the

corporation. Plaintiff sold his stock to his brother at $50 per share. At issue was the defendant brother's representations to the plaintiff that he would "take the same deal" if he was the seller instead of the buyer. Six years later, the defendant brother sold the stock at a substantially higher price, $338 per share. The district court granted summary judgment in favor of the defendant brother, and the Sixth Circuit, in weighing the evidence before it, affirmed, stating that "[w]e find it unlikely that a reasonable shareholder would consider [the brother's remark] to be "material." *Aschinger*, 934 F.2d at 1410. The Court also found plaintiff's reliance on the statement to be "unreasonable." *Id.* Finally the Court concluded that there was no evidence of an intent to defraud, because the price disparity in the stock, by itself, was insufficient to show knowledge of falsity. *Id.*

It is apparent that, in *Aschinger*, the Sixth Circuit improperly drew inferences in favor of the moving party and made a factual determination that should have been left for a jury. After all, it is not unreasonable to rely on a brother's statement that he would sell stock at the same price for which he is proposing to buy it. Further, the mere disparity in price gives rise to the reasonable inference that the defendant brother was lying to the plaintiff when he made the statement at issue. As such, summary judgment should have been denied and the matter should have gone to trial. Similarly, the court's analysis of what a reasonable shareholder would find "material" invades the jury's province.

Likewise, in *Williams v. Borough of West Chester, Pennsylvania*, 891 F.2d 458 (3d Cir. 1990), the parents of an individual who committed suicide while in police custody sued the City and certain members of the City's police force. The decedent, who had a history of suicide attempts, hanged himself with his belt while incarcerated. To prevail, the plaintiffs needed to demonstrate that the defendants acted with deliberate indifference towards the possibility of

suicide. Plaintiffs introduced testimony from one officer that the decedent's history of suicide attempts was "widely known" in the police department. *Williams*, 891 F.2d at 465. Defendants introduced evidence showing that the officers had no knowledge of the decedent's history. *Id.* at 465-66. Despite this clear factual dispute, the district court granted defendants' summary judgment motion and the Third Circuit affirmed, stating that, although the case was "extremely close," the plaintiff did not produce *sufficient* evidence upon which a reasonable jury could have concluded that the officers knew about the decedent's history. *Id.* at 466. The Third Circuit even conceded that the plaintiffs had introduced "some circumstantial evidence tending to show deliberate indifference," but that was not "enough [evidence] to survive summary judgment." *Id.* The Third Circuit was required to draw all inferences in favor of the plaintiff, and was not at liberty to discount the evidence supporting the inference of deliberate indifference. Instead, however, it improperly weighed the evidence and incorrectly substituted summary judgment for a jury trial.

By way of contrast, in *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987), the Fifth Circuit reversed the entry of summary judgment in favor of defendants. In granting summary judgment, the district court characterized defendant's evidence as "impressive and comprehensive" while labeling plaintiff's evidence as "inaccurate and imprecise." *Id.* at 293. The Fifth Circuit reversed, finding that the district court's language clearly showed that it impermissibly weighed the evidence. The Fifth Circuit's correction of the district court's error shows that the Fifth Circuit's jurisprudence is clearly contrary to the holdings of the Third Circuit in *Williams* and the Sixth Circuit in *Aschinger*.

In this case, both the District Court and the Eighth Circuit (1) impermissibly weighed evidence; (2) improperly resolved

credibility determinations in favor of IBP and Peterson; (3) wrongfully rejected Luigino's' reasonable inferences, essentially considering them to be implausible without the benefit of seeing any witnesses testify; and (4) drew inferences in favor of the movants, IBP and Peterson. This case therefore presents a classic example of judicial weighing of circumstantial evidence on a pretrial motion, *in a case in which IBP's intent and state of mind are at issue and IBP had the burden of persuading the trier of fact that at all times it acted in good faith*, as more fully discussed *infra*.

The Eighth Circuit's weighing of the evidence is palpable in comments such as the following:

> Luigino's asserts that if Peterson had disclosed that one of IBP's subsidiaries was gearing up to launch a premium Mexican food line, it would have accelerated investment in Howlin' Coyote to secure first mover advantage. *This is far too slender a reed upon which to support a causal link between Peterson's presence on Luigino's' board and competitive harm to the Howlin' Coyote line.*

App. 8a (emphasis added). In so ruling, the Eighth Circuit necessarily weighed conflicting evidence, and improperly construed a reasonable inference against the non-moving party, Luigino's. Had it followed *Anderson*, the Eighth Circuit would have recognized that it would have been reasonable for Luigino's to step up its production of Howlin' Coyote to beat José Olé to the market, and that it was therefore required to accept this uncontradicted evidence as true in the summary judgment proceedings. *Anderson*, 477 U.S. at 251, 252.

Further, in inferring that Luigino's should have known about the possibility that IBP would produce a competing product, the Eighth Circuit found that Luigino's had

"extensive knowledge" of IBP's Mexican products (App. 8a), when in fact, although there was some evidence that Luigino's knew about fragmented, low-end products produced by IBP's subsidiary, the uncontradicted evidence was that those products unequivocally did not compete with Luigino's products. At best this constitutes weighing of the evidence, and at worst this constitutes a refusal to draw all reasonable inferences in favor of the nonmoving party.

The Eighth Circuit also disregarded its own jurisprudence that summary judgment is not proper merely because one set of facts appears more plausible[5] than that offered in opposition to the motion. *See Handeen v. Lemaire*, 112 F.3d 1339, 1354 (8th Cir. 1997) (a movant is not entitled to judgment simply because the facts offered by it appear more plausible than those facts tendered in opposition). By accepting the evidence offered by IBP that its subsidiary independently developed José Olé, the Eighth Circuit weighed that evidence and found it **more plausible** than Luigino's' evidence that Peterson's knowledge of Luigino's' plans for Howlin' Coyote triggered a change in direction for the José Olé line, from an amalgamation of several low-end,

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[5] Some lower courts have expanded the implausibility doctrine that this Court set forth in *Matsushita* with regard to assessing the "genuineness" of a nonmovant's economic theory in an antitrust setting. In so doing, those courts have increased the nonmovant's burden to oppose a summary judgment motion by obligating the nonmovant to present more compelling proof that than which a jury may require in rendering a verdict. *See*, e.g. *Knight v. Sharif*, 875 F.2d 516, 523 (5th Cir. 1989)(finding that plaintiff could not provide plausible interpretation of disputed documents); *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.*, 865 F.2d 492-93 (2d Cir. 1989)(holding that plaintiff could not prove causation in breach-of-duty action); *Cuesta v. Sch. Bd.*, 285 F.3d 962, 970 (11th Cir. 2002)(concluding that defendant did not need to introduce evidence contradicting plaintiff's argument because argument itself was implausible). This Court should eliminate the confusion caused by the implausibility doctrine, and clarify the extent that the it applies in actions other than antitrust.

hand-held products under a single umbrella brand in channels of distribution other than supermarkets and grocery stores, to a reformulated line of premium retail frozen entrées to be sold in supermarkets and grocery stores.[6]

The Eighth Circuit also improperly reviewed the evidence regarding the so-called "causation" issue, which it determined was fatal to Luigino's' case, by separating, isolating, and rejecting in piecemeal fashion each element of Luigino's' circumstantial evidence regarding this issue, including Peterson's state of mind (bad faith), rather than considering the cumulative effect of the totality of that evidence. This violated this Court's directive that on a summary judgment motion the evidence must be reviewed by the court "as a whole." *Matsushita*, 475 U.S. at 587. *See also In re: High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 657 (7th Cir. 2002); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 505 (6th Cir. 1996); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993); Miller, *supra,* at 1032, 1064, 1092-93, available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf.; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73, 93 (1990); Collins, *supra*, at 492.

Further, neither the Eighth Circuit nor the District Court considered IBP's past similar acts with respect to C&F and Don Miguel, or Luigino's' expert testimony that it was reasonable to conclude that IBP used Luigino's' trade secrets and confidential information to accelerate the launch of José Olé and become the "early starter" in the market, more fully

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[6] Further, IBP's alleged independent development of José Olé and IBP's use of Luigino's confidential and/or trade secret information to facilitate development are not mutually exclusive. IBP could have developed José Olé but could also have been standing "on the shoulders of giants" by using the information from Luigino's to beat Luigino's to the retail, branded frozen entrée market as an "early starter."

described at footnotes 2 and 3, *supra*. In fact, the District Court expressly ignored evidence from Luigino's expert, stating that its conclusion "would be no different." App. 15a, n. 2. This evidence was relevant to the issue of IBP's lack of good faith, and the lower courts were required to accept such evidence for the purposes of summary judgment, and draw all reasonable inferences from that evidence in favor of Luigino's.

The District Court's opinion also contains language showing that it made credibility determinations and weighed evidence against Luigino's. One of Luigino's' directors testified in deposition about the information that was conveyed to the Board of Directors, including Peterson, regarding Howlin' Coyote. The District Court discounted this testimony, characterizing it as "dim." App. 20a.

The District Court further weighed evidence and drew an inference against Luigino's when it improperly characterized Luigino's' decision not to expand Howlin' Coyote further in 2000 as a "decision to sideline Howlin' Coyote," which indicates that the district court erroneously concluded that Howlin' Coyote was abandoned at that time. App. 37a. The District Court also determined that Luigino's did not introduce evidence that Peterson learned about José Olé prior to February of 2000, even though Luigino's introduced evidence that Peterson's "right hand man" was an integral part of the development of José Olé. Rather than inferring that two directors would share this information, which appears to be reasonable, the District Court declined to do so, instead labeling the evidence "conclusory." App. 27a. Nothing in the trilogy suggests that these fact and inference laden "determinations" and "conclusions" should be resolved under Rule 56.

The only thing consistent about the current application of the trilogy by federal courts is the inconsistency of its

application. Although the trilogy contains "qualifying language reaffirming the significance of trials and juries, indicating that the three cases are not carte blanche to the district courts; . . ." (*see*, Miller, *supra*, at 1041, available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf), several courts have found that the trilogy, "taken in the aggregate, lowered the movant's burden on a summary judgment motion." *See Barrett v. Harrington*, 130 F.3d 246, 252 (6th Cir. 1997); *Nicely v. McBrayer, McGinnis, Leslie & Kirkland*, 163 F.3d 376, 380 (6th Cir 1998).

Further, there are several instances in which federal courts have appeared to apply *Matsushita* to authorize courts to weigh evidence at the summary judgment stage, in effect requiring the nonmovant to **prove** its case, not merely to demonstrate the existence of a "genuine issue of material fact." *See, e.g., In re Baby Food Antitrust Litigation*, 166 F.3d 112, 121-32 (3d Cir. 1999)(citing *Matsushita* in affirming grant of summary judgment against plaintiffs after discounting plaintiffs' expert testimony and asserting that ordinary business practices were just as likely explanations for exchanges of pricing information, discovery of competitors' memoranda in defendants' files, and "truce" between defendants); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993) (finding that plaintiff provided insufficient testimony of four expert witnesses, including two medical experts, in support of the proposition that defendant's product was proximate cause of decedent's death); *Zettle v. Handy Mfg. Co.*, 998 F.2d 358, 362-63 (6th Cir. 1993)(affirming summary judgment in products liability case in part because plaintiff failed to prove that death by electrocution was foreseeable result of defendant's use of metal instead of plastic handle on its electric washer, despite plaintiff's deposition of defendant's engineer who admitted that company was aware that some of their customers tended to use out-of-date wiring systems, which would heighten risk that electric currents would flow through handle); *Wonder*

Labs, Inc. v. Procter & Gamble Co., 728 F. Supp. 1058, 1064-66 (S.D.N.Y. 1990)(court granted summary judgment in a trademark action by a toothbrush manufacturer having registered the mark "Dentist's Choice" against a toothpaste manufacturer that used the term "dentist's choice" in its advertising in part because plaintiff could not provide sufficient evidence of the likelihood of confusion).

It is clear from this case and the authorities cited that district courts and courts of appeal are not uniformly applying the summary judgment principles articulated in this Court's 1986 trilogy. More troubling is the fact that the Eighth Circuit, and the District Court of Minnesota, impermissibly weighed evidence, construed inferences in favor of the moving party, and made credibility determinations that denied Luigino's the ability to reach trial and that denied Luigino's its Seventh Amendment right to a jury trial. *See* Fed. R. Civ. P. 38(a). These types of overly aggressive uses of summary judgment, unfortunately, appear to have become common since the 1986 trilogy and trench upon this Court's long history of deference to a litigant's constitutional right to a jury trial. Equally distressing is the inconsistency of practice across the circuits.

As previously stated, there were several instances of the lower court's weighing of the evidence, drawing inferences in favor of the nonmoving party, and otherwise invading the province of the jury on summary judgment. Properly considered in its entirely, however, the evidence created a reasonable inference that IBP used Luigino's' trade secret and/or confidential information to launch its line of José Olé products, especially since Peterson did not disclose any aspect of José Olé to Luigino's. A reasonable juror certainly could have concluded that IBP used Luigino's' trade secrets and/or confidential information to develop its José Olé products and to identify significant opportunities to market the same. Thus, a "genuine issue of material fact" was

created within the meaning of Rule 56.

Accordingly, this case affords this Court with an opportunity to provide much needed guidance about the application of the principles articulated in the trilogy. That is the only way to ensure that plaintiffs like Luigino's are no longer denied their constitutional right to a trial by jury, or their due process right to confront and cross-examine adverse witnesses whose credibility goes to the very crux of a case, or to be subjected to a crazy-quilt of significant variations in the application of Rule 56.[7]

Further, it is important to note that the trilogy of summary judgment cases and the way in which they are interpreted and applied not only affects litigation in the federal judicial system, but also in numerous states. *See* Miller, *supra,* at 1051, available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf. For example, California, Massachusetts, Missouri, New Jersey, Arizona, and Tennessee, as well as the District of Columbia, have adopted the standards for summary judgment set forth in this Court's 1986 decisions. *See, e.g.*, *Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493 (2001); *Kourouvacilis v. General Motors Corp.*, 575 N.E.2d 734 (Mass. 1991); *Y.G. & L.G. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488, 495, n 2 (Mo. Ct. App. 1990); *Brill v. Guardian Life Ins. Co. of America*, 666 A.2d 146 (N.J. 1995); *Orme School v. Reeves*, 802 P.2d 1000 (Ariz. 1990); *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993); *Graff v. Malawer*, 592 A.2d 1038 (D.C. 1991).

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[7] Although the intent of summary judgment may be to prevent non-meritorious cases from proceeding to trial, there is considerable doubt that its increased use actually has reduced litigation. Arguably, summary judgment motions increase litigation costs, protract litigation, and promote appeals. As one commentator has noted, "the asserted 'efficiency' of summary judgment compared to trial has simply been assumed but has yet to be proven." *See* Miller, *supra,* at 1093, available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf.

Only this Court can establish the proper balance between the objectives of the summary judgment procedure and a litigant's constitutional jury trial rights. Only this Court can eliminate the significant inconsistencies that have developed among the federal courts in the administration of the principles enunciated in the 1986 trilogy. And only this Court can provide much needed guidance to the federal courts on some of the procedural aspects of those cases that quite clearly have generated confusion.

B. The decision of the Eighth Circuit Court of Appeals is in conflict with the decisions of the other Courts of Appeal and contradicts the mandate of this Court.

Pursuant to Minnesota law, once a plaintiff asserting a claim for breach of fiduciary duty satisfies his burden of showing (1) the defendant's fiduciary duty; and (2) the existence of a corporate opportunity, the burden shifts to the defendant to prove that he or she at all times acted in good faith. *See Miller v. Miller*, 222 N.W.2d 71, 82 (Minn. 1974); *Honn v. Coin & Stamp Gallery, Inc.*, 407 N.W.2d 419, 422-23 (Minn. App. 1987). At the summary judgment stage, Defendants unequivocally admitted the existence of Peterson's fiduciary duty to Luigino's in a response to a Request for Admission, and, by virtue of evidence showing Luigino's' pursuit of Howlin' Coyote, Luigino's satisfied its burden of persuasion regarding the existence of a corporate opportunity for it to enter the market for producing a line of premium, Mexican and/or southwestern frozen food entrées.

According to this Court's conclusion in *Anderson*, 477 U.S. at 255, and applying the substantive evidentiary burdens outlined in *Miller v. Miller* and *Honn*, *supra*, at this juncture, the burden of persuasion should have been shifted from Luigino's to IBP and Peterson to show that there was no genuine issue of material fact about whether they acted at all

times in good faith toward Luigino's. The district court failed to do this, and instead entered summary judgment in favor of IBP and Peterson, finding, *inter alia*, that Luigino's "can prove no causal link" (i.e., a nexus between Peterson's exposure to trade secrets and confidential information pertaining to Luigino's' Howlin' Coyote line and IBP's introduction of the José Olé line) on its breach of fiduciary duty claim. By failing to place the burden of proof on IBP and Peterson to show their good faith, the Eighth Circuit held Luigino's to an impossible standard—one that is not required by this Court or employed by other Courts of Appeals.

In addition to its failure to shift the burden of persuasion to Defendants, the district court failed to consider that the Defendants must satisfy a heightened burden on a Rule 56 motion. Luigino's' breach of fiduciary duty claim, which is based upon the usurpation of a corporate opportunity, is a "state of mind" claim. *Miller v. Miller*, 222 N.W.2d at 81-82. Its determination requires consideration of "all other facts and circumstances bearing on the officer's good faith and whether he exercised the diligence, devotion, care, and fairness toward the corporation . . . ." *Id.* at 82. As such, summary judgment is **rarely** granted when state of mind is at issue. *See, e.g., 60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1437 (6th Cir. 1987); *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990); *National Fire Ins. Co. v. Turtur*, 892 F.2d 199, 205 (2d Cir. 1989); *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707, 711 (2nd Cir. 1991). "The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 2730 (3d ed. 2003). "When state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility." *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257,

1265 (5th Cir. 1991). In state of mind cases, the entry of summary judgment in favor of a defendant is proper only "if the evidence is such that *every* reasonable juror would conclude that defendants have met their burden . . . ." *Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 1057 (6th Cir. 2001). *See also* Miller, *supra,* at 1028, available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf. Thus, to obtain summary judgment, the burden was on Peterson and IBP to show that every reasonable juror would have concluded that Peterson and IBP acted in good faith.

Further, since Defendants had the ultimate burden of proving Peterson's good faith, this Court's trilogy required Peterson and IBP to satisfy the even greater burden to demonstrate the absence of a triable issue regarding Peterson's state of mind in order to obtain summary judgment. As stated by the Fifth Circuit in *Rally's*, *supra*:

> We recognize that in this case, the moving party bears the burden of proof at trial on the issue of state of mind—that it is Rally's burden to prove its own good faith . . . , *not* Shortstop's burden of proving Rally's bad faith (i.e. lack of good faith) . . . . *To the extent that summary judgment is rarely appropriate when state of mind is at issue, it is even less fashionable when the moving party bears the burden of proving its own state of mind.*

Rally's, *supra*, at 1266, n 8 (emphasis added). *See also Dadurian v. Underwriters At Lloyd's, London*, 787 F.2d 756, 762 (1st Cir. 1986)(courts are reluctant to direct a verdict for the party having the burden of proof).

The courts below sanctioned IBP and Peterson's failure to meet this heightened burden. In fact, the District Court and the Eighth Circuit neglected to address either (1) Defendants' burden of persuasion to show good faith; or (2)

the difficulty in satisfying such burden when state of mind is at issue. In fact, the lower courts' repeated reference to Luigino's alleged failure to introduce certain evidence shows that it did not properly apply the burden of persuasion. Viewed in the light most favorable to Luigino's, Peterson's testimony that he didn't know about José Olé until January of 2000—if it is to be believed[8]—does not inexorably lead to the inference that Peterson acted in good faith towards Luigino's because it also leads to the reasonable inference that Peterson acted in bad faith toward Luigino's after January of 2000, when he learned about José Olé, and failed to advise Luigino's about its impending launch.

Similarly, viewed in the light most favorable to Luigino's, IBP's evidence of research and development of José Olé—upon which the Eighth Circuit relied heavily—does not lead to the inevitable result that every reasonable juror would conclude that IBP developed José Olé without any use of Luigino's' confidential information or trade secrets, and/or that Peterson acted in good faith. Although IBP may have spent time and money in the development of José Olé, this does not warrant a conclusive inference that IBP did not use any of the information it acquired from Luigino's to its advantage. The two are not mutually exclusive. Luigino's does not dispute that IBP had a presence in the low-end hand-held Mexican food markets in foodservice and convenience stores prior to its contact with

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[8] Peterson's statement that he never told anyone at IBP about Howlin' Coyote is directly and materially contradicted by the testimony of IBP's CFO, who testified that Peterson advised him about Howlin' Coyote. Viewed in the light most favorable to Luigino's, this conflicting evidence supports the inference that Peterson lied under oath regarding what he said to IBP about Luigino's' plans for Howlin' Coyote. This conflicting testimony not only makes this question trialworthy, but it demonstrates the importance of Peterson's credibility, upon which Peterson and IBP's entire case rests. This evidence also casts doubt upon Peterson's alleged good faith, upon which Defendants bear the trial burden of proof.

Luigino's. Rather, it maintains that IBP used the know-how it acquired from Luigino's to facilitate its entry into a separate and distinct market—frozen entrées sold in grocery stores and supermarkets—in which it had no prior presence or business acumen. It also maintains that IBP has not satisfied its burden to show that Luigino's has failed to introduce evidence upon which a reasonable juror could find in its favor.

As such, IBP's showing was insufficient to satisfy IBP and Peterson's burden of showing Peterson's good faith, especially in light of Luigino's' proof that some José Olé products were literally identical to Howlin' Coyote products. A triable issue existed because there was a genuine factual dispute, and the courts below could not, as a matter of law, rule that every reasonable juror would accept IBP and Peterson's evidence and conclude that IBP did not use the Howlin' Coyote information learned by Peterson to assist in launching José Olé. Only this Court can assure that its 1986 mandates are understood and followed, that Rule 56 is properly and consistently administered, and that trialworthy cases are not prematurely terminated.

The misallocations of the burden of proof by the courts below prematurely terminated Luigino's case, deprived Luigino's of its Seventh Amendment right to a jury trial in violation of Rule 38(a), and denied Luigino's' constitutional due process right to cross-examine live adverse witnesses under circumstances in which the contradictory discovery testimony of two critical adverse witnesses existed. Under the lower courts' reasoning, the only way for Luigino's to establish a genuine issue of material fact on "causation" would be for it (1) to produce "smoking gun" documentary evidence; (2) to secure an admission from Peterson during discovery that he told persons within IBP about Howlin' Coyote; or (3) if all facts regarding causation supported Luigino's' claim of causation and no facts supported IBP's

claim of "no causation." The issue posed by the practice of the courts below has extremely widespread application because the standard they applied poses an impossible hurdle, in cases of fraud, breach of fiduciary duty, and theft of a trade secret, for any party who relies upon circumstantial evidence to overcome a summary judgment motion.

It is not uncommon for district courts to misallocate the burden of persuasion on summary judgment, fail to consider the movant's burden before addressing the nonmovant's burden, or, in violation of *Anderson*, fail to appreciate the heightened burden. *See, e.g., Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 802 (5th Cir. 1993)(reversing summary judgment where defendant/movant did not satisfy its burden, and therefore the burden did not shift back to plaintiff to provide supporting evidence); *Jones v. City of Columbus, Ga.*, 120 F.3d 248, 253-254 (11th Cir. 1997)(reversing summary judgment where district court did not address movant's initial burden before determining whether nonmovants met their burden); *Hagadorn v. M.F. Smith & Associates, Inc.*, 172 F.3d 878 (10th Cir. 1999)(reversing summary judgment where defendant/movant failed to satisfy its "heightened" evidentiary burden); *Hemstreet v. Burroughs Corp.*, 861 F.2d 728 (Fed. Cir. 1988)(reversing summary judgment where the defendant/movant did not satisfy its "heavy burden of persuasion" of showing plaintiff/nonmovant's inequitable conduct); *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1195-1196 (10th Cir. 2002)(reversing summary judgment where the defendant/movant did not satisfy its burden of setting forth "clear and convincing evidence" of retaliatory discharge). Unlike the cases cited above, the Eighth Circuit in this case did not correct the errors of the district court.

It is therefore necessary for this Court to comment further on and clarify the important role of the proper burden of persuasion in ruling on summary judgment motions, in order

to prevent further error by the lower federal courts. This case presents the perfect vehicle for this Court to do so.

C. An improvidently granted summary judgment motion denies a party the constitutional right to a jury trial, and the right to cross-examine adverse witnesses.

This Court has repeatedly acted to accord the Seventh Amendment respect and scope, consistent with Rule 38(a). In its decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court demonstrated its commitment to "protect the constitutional right to a jury trial" by limiting the discretion of a trial judge to decide issues that may infringe upon that right. *Dairy Queen*, 359 U.S. at 472; *Beacon Theatres*, 359 U.S. at 510. This commitment was reinforced by this Court's pre-trilogy decisions pertaining to the entry of summary judgment. *See, e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962)("[S]ummary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken then plot. It is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'."); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)("[T]he summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)("The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by

substituting trial by affidavit and the sterile bareness of summary judgment.").

The 1986 trilogy, however, did not and should not undermine that longstanding commitment to protect the jury trial right. In *Anderson*, the Court stated that "[o]ur holding . . . does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, ..." *Anderson*, 477 U.S. at 255. In *Celotex*, the majority stated that "Rule 56 must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried before a jury . . . ." *Celotex*, 477 U.S. at 327.

Indeed, since the trilogy, this Court has reaffirmed the importance of the Seventh Amendment jury trial right in several contexts. *See, e.g., Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1989); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

Unfortunately, the decisions of the District Court and the Eighth Circuit in this case and, as discussed earlier, *supra* at 17-18, those of a significant and growing number of other courts, have employed an overly aggressive application of this Court's 1986 trilogy that deprives litigants of their constitutional jury trial right. As one commentator has argued, it is time for this Court to intercede:

> Taking decisionmaking authority from juries runs counter to basic and long-cherished principles of our system. One primary function of the jury has been to

> make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards, the paradigm being the reasonable person standard. Since the Supreme Court trilogy, there is evidence that these responsibilities have been taken away from juries by pretrial disposition even when none of the possible justifications for restricting jury trial discussed in this Article are present. Given the existing, convoluted jurisprudence, it is imperative that the Supreme Court provide some clarity rather than leaving the matter entirely to the genial anarchy of trial court discretion.

Miller, *supra,* at 1134, available at http://www.nyu.edu/pages/lawreview/78/3/miller.pdf. Other commentators have expressed similar observations regarding the tension between summary judgment and the constitution right to a jury trial.[9] This case provides a much needed opportunity to re-affirm this Court's commitment to a litigant's constitutional right to a jury trial, to reduce the confusion apparent in the case law, and to prevent misapplications of Rule 56.

It was critical that Luigino's be permitted to cross-examine Peterson at trial before a jury because Peterson's state of mind (i.e., good faith or bad faith) is the case's central issue. "Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." 10B

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[9] *See* Stempel, *supra*, at 165; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, at 255, 256 (1993); Robert J. Gregory, *One Too Many Rivers To Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla. St. U. L. Rev. 689, at 702 (1996).

Wright, Miller & Kane, *supra*, § 2730. The decisions of the courts below are in striking contrast to that of the Fifth Circuit, which, citing Justice Rehnquist's dissent in *Anderson*, has stated:

> [I]t is particularly difficult for the nonmoving party to challenge the "self-serving testimony" of the moving party without the benefit of trial accessories, namely cross-examination. . . . Only through *live* cross examination can the fact-finder observe the demeanor of a witness, and assess his credibility. A cold transcript of a deposition is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: "that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers."

Rally's, supra at 1265-66 (citing *Anderson*, 477 U.S. at 270 (Rehnquist, J., joined by Burger, C.J., dissenting)).

Luigino's, like other litigants, has been denied its Seventh Amendment right to a jury trial by the lower court in violation of Rule 38(a). Both the District Court and the Eighth Circuit overstepped the permissible boundaries of summary judgment, and invaded the province of the jury. This rush to judgment appears to be common in today's federal practice.[10] As more and more cases are being

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[10] An analogy can be drawn between this case and the case of *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), in which this Court held that, in order to survive a motion to dismiss, a discrimination plaintiff need not plead more evidence than he or she must prove to succeed on the merits at trial. *Id.* at 511-512. Likewise, in order to survive summary judgment, Luigino's should not be required to submit

resolved by summary judgment "trial by affidavit," litigants' constitutional right to a jury trial is being eroded. The nation's founders placed great confidence in the jury system, in part because it may be the sole instrument of official power without an agenda. As it appears that lower courts are weakening our deeply rooted and fundamental commitment to trial and jury trial for the chimera of efficiency, the time is now for this Court to reaffirm these cherished principles, upon which our civil judicial system is based.

CONCLUSION

THEREFORE, Petitioner, Luigino's, Inc., requests that this Court it grant its Petition for Writ of Certiorari to the United States Court of Appeal for the Eighth Circuit.

Respectfully submitted,

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more evidence than is necessary to create a genuine issue of material fact than that upon which a reasonable jury could find for Luigino's at trial.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1521

LUIGINO'S, INC., A MINNESOTA CORPORATION,
PLAINTIFF/APPELLANT,

v.

ROBERT PETERSON, INDIVIDUALLY; IBP, INC., A DELAWARE
CORPORATION, DEFENDANTS/APPELLEES.

Appeal from the United States District Court for
the District of Minnesota

Submitted: November 6, 2002

Filed: January 30, 2003

Before WOLLMAN, LAY, and LOKEN, Circuit Judges:

WOLLMAN, Circuit Judge.

Luigino's, Inc. appeals the district court's[1] grant of summary judgment to Robert Peterson and IBP, Inc. on

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[1] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

Luigino's claims of breach of fiduciary duty, negligent misrepresentation, corporate usurpation, misappropriation of trade secrets, and breach of confidentiality agreement. We affirm.

I.

Luigino's is a Minnesota corporation engaged in the manufacture and sale of frozen food entrees under the brand names Yu Sing and Michelina's. At all times relevant to this litigation, IBP was a publicly held company headquartered in South Dakota with approximately $13 billion in annual sales and 56 direct or indirect subsidiaries. In May 1997, IBP acquired Specialty Brands, Inc. (SBI), a manufacturer of frozen Mexican foods, when it acquired SBI's parent company, Foodbrands America, Inc. (Foodbrands). For more than two years prior to its acquisition by IBP, SBI sold frozen Mexican food through convenience stores, warehouse clubs, and grocery stores under four different brand names: Butcher Boy, Posada, Little Juan, and Marquez. Patrick O'Ray, the president of SBI, began the process of consolidating these brands shortly after he became president of SBI in 1995. O'Ray presented this idea to the Foodbrands directors in September 1996, and by early 1998 had hired several people to assist with the launch of the new brand.

In 1997, Jeno Paulucci, founder and Chairman of the Board of Luigino's, contemplated selling Luigino's. On February 13, 1998, IBP and Luigino's entered into a confidentiality agreement so that IBP could examine Luigino's and decide whether to purchase the company. Paulucci rejected IBP's highest offer during the summer of 1998. In September 1998, SBI's Director of Marketing, Robert Berry, began the market research that would lead to the launch of the consolidated José Olé brand. Through copies of IBP's 1997 Annual Report and by sampling SBI's

frozen Mexican foods, Paulucci and other Luigino's employees knew of IBP's offerings in the frozen food market. In a December 23, 1998, letter, Paulucci invited Peterson to sit on the Luigino's Board of Directors, suggesting he could "keep an eagle eye on this business." Peterson agreed to sit on the board and completed a questionnaire at Luigino's request for purposes of Luigino's January 1999 bond offering. In response to one question, Peterson stated that he sat on the board of IBP, that IBP and its subsidiaries manufacture food products, and that none of IBP's products directly competed with Luigino's products. Peterson attended Luigino's board meetings on April 13, 1999, July 13, 1999, and November 9, 1999. Several Luigino's employees and directors who knew of IBP's ownership of SBI and of SBI's frozen Mexican food business also attended these meetings.

On February 18, 2000, SBI submitted a capital expenditure request to Peterson and the IBP board of directors. Peterson attended no Luigino's board meetings after he received this request. SBI's launch of José Olé was announced in April and the products began appearing in stores in June 2000. By this time, the Luigino's Howlin' Coyote line had been in several markets for several months. The José Olé line included 26 items, 21 of which were products that SBI had previously offered under another brand name. The five new items were twelve-ounce items sold in bowls. SBI conducted market tests on the bowl products beginning in February 1999. In June 2000, Stouffer's launched a line of frozen Mexican food products under its Ortega brand. Anticipating great difficulty competing with two extensively marketed lines, Luigino's suspended work on the Howlin' Coyote line on June 14, 2000.

II.

We review the district court's grant of summary judgment *de novo,* viewing the evidence in a light most favorable to the nonmoving party. *Toghiyany v. AmeriGas Propane, Inc.,* 309 F.3d 1088, 1091 (8th Cir.2002). "Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Viking Supply v. National Cart Co.,* 310 F.3d 1092, 1095 (8th Cir.2002).

The district court held that Luigino's failed to assert facts sufficient to support a finding of a causal link between any of the defendants' alleged improprieties and Luigino's alleged damages. Luigino's bears the burden of demonstrating causation on each claim. *Nguyen v. Control Data Corp.,* 401 N.W.2d 101, 105-06 (Minn.Ct.App.1987) (affirming judgment as a matter of law on negligence, misrepresentation, contract, and fiduciary obligation claims for lack of evidence of causation). "A mere possibility of causation is not enough." *Id.* at 105; *see also Klimstra v. Granstrom,* 95 F.3d 686, 692-93 (8th Cir.1996) (finding lack of causation on both contract and negligence claims and citing *Nguyen*). We agree with the district court that each claim fails for lack of causation because Luigino's failed to present evidence sufficient to support an inference that IBP used Luigino's confidential information to its advantage or to Luigino's detriment.

As a preliminary matter, Luigino's alleged that IBP obtained Luigino's confidential information, either through Peterson's attendance at board meetings or during IBP's failed negotiations to purchase Luigino's. This information included: (1) Luigino's research and development information, (2) Luigino's financial information, (3) income statements and documents reflecting volume and sales

margins, (4) details pertaining to the launch of Howlin' Coyote, (5) Luigino's top ten customers by volume, (6) the Offering Circular, (7) a second Offering Circular pertaining to snack items, and (8) EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) projections for Luigino's through 2004. We agree with the district court that the first three items are merely general categories of information, insufficiently specific to qualify as trade secrets. *See Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897-99 (Minn.1983). Although these general categories of information are not actionable under Luigino's misappropriation claim, we consider this confidential information under Luigino's breach of contract and breach of fiduciary duty claims.

In support of its causation argument, IBP relies principally on the timing of IBP's launch of José Olé and the similarity between some of the José Olé food items and those offered by Luigino's under the Howlin' Coyote brand. Luigino's directs us to the following record evidence: (1) prior to IBP's introduction of José Olé in 2000, no IBP or SBI products had been sold in the frozen entree section of grocery stores; (2) prior to the launch of José Olé, SBI's products were low-end handheld products, only a small number of which were sold in grocery stores; (3) in 1998 IBP was exposed to confidential information about Luigino's Michelina's and Yu Sing lines of frozen entrees; (4) in July 1999 Peterson was exposed to trade secret information at a Luigino's board meeting regarding the development of Luigino's Howlin' Coyote brand of Mexican/Southwestern frozen entrees; (5) in October 1999, SBI submitted to the IBP board a Request For Appropriation to "[d]evelop and launch a new frozen Mexican food brand into the Retail and Warehouse Club Channels"; (6) one reason IBP declined to purchase Luigino's in 1998 was its view that Michelina's was not in a growth category; (7) José Olé and Howlin' Coyote

included similar products; (8) Luigino's frozen food industry expert's testimony that, based on the similarities between the two product lines, IBP probably used manufacturing, retail trade and consumer information to develop the José Olé line.

Luigino's has thus identified several categories of confidential information and evidence that Luigino's was exposed to the information. Except for citing similarities between the two product lines, however, Luigino's failed to allege how such information was used in the launch of José Olé and did not point out any circumstantial evidence supporting such an inference. Luigino's industry expert asserted a theory that IBP's knowledge that Luigino's thought it was possible to succeed in the frozen Mexican food market gave IBP confidence that it could be done, resulting in IBP's decision to enter the market. Luigino's does not seem to place much reliance on this theory on appeal, however, and in any case the theory does not provide a causal connection between IBP's possession of confidential information and harm to Luigino's. Rather, it merely establishes a temporal relationship between IBP's knowledge that Luigino's thought it could succeed in the frozen Mexican entree market and IBP's overcoming its own concerns about whether to risk entering that market.

We are left with the similarities between the Howlin' Coyote and José Olé product lines, which Luigino's claims are so striking that under no stretch of the imagination could they be the result of coincidence. IBP's José Olé line includes a "Chicken Fajita Bowl" product, a twelve-ounce meal containing grilled chicken breast with bell peppers and onions over seasoned rice and beans, all in a microwaveable bowl. The Howlin' Coyote line includes a "Grilled Fajita-Style Chicken" product, an eleven-ounce meal described as "zesty fajita sauce and chicken breast (with rib meat), vegetables and seasoned rice." The José Olé line also

contains a "Beef Steak Fajita Bowl" and a "Chicken & Salsa Bowl," which Luigino's compares to its "Skillet Fajita-Style Beef" and "Grilled Chicken with Fire-Roasted Tomatoes" products. That José Olé contains chicken and beef fajita and chicken with salsa products superficially similar to Howlin' Coyote products is unremarkable. Neither fajita products nor bowl products were innovations introduced to the frozen food market by the product lines at issue in this case. IBP began market testing the bowl products in February 1999, before Peterson had attended any Luigino's board meetings. Even when viewed in a light most favorable to Luigino's, the product similarities do not support an inference that IBP used Luigino's confidential information to develop products for the José Olé line. Luigino's directs us to no evidence that IBP used any of the cited confidential information, such as the list of Luigino's top ten customers, its financial information, its documents reflecting volume and sales margins, or its research and development information. The superficial similarity between some of the competing products is insufficient to support an inference that José Olé contains those products because IBP was exposed to confidential Luigino's information.

To the contrary, the evidence in the record all points to independent development of the José Olé line by IBP's indirect subsidiary SBI. SBI's president began a program to consolidate its splintered brands in the frozen Mexican food market in 1995. The idea was presented to Foodbrands, SBI's parent company and IBP's direct subsidiary, in September 1996. By early 1998, SBI had hired an experienced group of employees to implement the plan to develop a consolidated umbrella brand. This team included Neil Ritchey, who had previously worked for Kraft foods, Rick Bauman, who had previously worked for Nestle and had experience in the Stouffer's retail frozen food line, and Robert Berry, who had previously worked for ConAgra and

had experience in marketing consumer food brands and retail items. In January 1999, SBI added Mitch Huff, who had experience in the retail food industry and who was responsible for building a team of brokers to launch the new brand. The experience SBI necessarily gained by hiring these individuals underscores Luigino's failure to present any evidence that confidential information obtained by IBP influenced SBI's development or launch of the José Olé brand.

Luigino's also argues that Peterson breached his fiduciary duty to Luigino's by failing to disclose the existence of IBP's José Olé project immediately after he learned of it at IBP's February 2000 board meeting. In January 2000, a month before Peterson learned of José Olé, Luigino's decided not to push Howlin' Coyote beyond the markets into which it had already been introduced, citing to the costs involved in expansion. Luigino's asserts that if Peterson had disclosed that one of IBP's subsidiaries was gearing up to launch a premium Mexican food line, it would have accelerated investment in Howlin' Coyote to secure its first mover advantage. This is far too slender a reed upon which to support a causal link between Peterson's presence on Luigino's board and competitive harm to the Howlin' Coyote line. *See Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252, 255-56 (8th Cir.1994) (affirming judgment as a matter of law on breach of fiduciary duty claim). Even if Peterson's fiduciary duty to Luigino's would ordinarily have required him to disclose knowledge of the imminent launch of a competitive product, in light of the undisputed evidence that Luigino's had extensive knowledge of IBP's food businesses when it hired him, Peterson's duty to disclose confidential IBP information to Luigino's was necessarily limited. The record discloses two reasons for Paulucci's inviting Peterson to sit on Luigino's board: (1) Luigino's needed outside experts on its board to secure the $100 million in bonds it

was seeking, and (2) Paulucci had not given up on selling the company to IBP. In *Medtronic,* we held that even with "an obvious conflict of interest," the plaintiff's failure to show that the defendant had used its position to gain inside information or other unfair advantage was fatal to its breach of fiduciary duty claim. *Id.* at 256. As in *Medtronic,* the harm alleged here is competitive in nature. Luigino's failed to establish a fact issue as to whether Peterson improperly conveyed confidential information that was used to assist the launch of José Olé. Thus, Luigino's breach of fiduciary duty claim premised on the harm to Luigino's from open competition by José Olé (and Ortega) was properly dismissed.

Because Luigino's failure to establish a genuine issue of material fact regarding causation defeats all of its claims, we need not address its other arguments raised on appeal.

In light of the basis upon which we affirm the district court, we deny the defendants' motion to strike portions of Luigino's revised reply brief and appendix.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1521

LUIGINO'S, INC., A MINNESOTA CORPORATION, APPELLANT,

v.

ROBERT PETERSON, INDIVIDUALLY; IBP, INC., A DELAWARE CORPORATION, APPELLEES.

Appeal from the United States District Court for
the District of Minnesota

[Entered: April 1, 2003]

The petition for rehearing by the panel filed by the appellant is denied.

(5193-010199)

April 1, 2003

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BY: s/ Michael E. Gans

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1521

LUIGINO'S, INC., A MINNESOTA CORPORATION, APPELLANT,

v.

ROBERT PETERSON, INDIVIDUALLY; IBP, INC., A DELAWARE CORPORATION, APPELLEES.

Appeal from the United States District Court for
the District of Minnesota

JUDGMENT

This appeal for the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

January 30, 2003

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BY: s/ Michael E. Gans

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 00-1246 (DWF/RLE)

LUIGINO'S, INC., A MINNESOTA CORPORATION, PLAINTIFF,

v.

ROBERT PETERSON, INDIVIDUALLY, AND IBP, INC., A DELAWARE CORPORATION, DEFENDANTS.

[Filed: Jan. 28, 2002]

MEMORANDUM OPINION AND ORDER

David H. Simmons, Esq. and Dale T. Gobel, Esq., Drage, deBeaubien, Knight, Simmons, Mantzaris & Neal, 332 Magnolia Avenue North, P.O. Box 87, Orlando, Florida 32802, appeared on behalf of Plaintiff.

Ronald J. Schutz, Esq., Emmett J. McMahon, Becky R. Thorson Esq., and Rita Coyle DeMeules, Esq., Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota, 55402-2015, appeared on behalf of Defendant.

FILED JAN 28, 2002
RICHARD D. SLETTEN, CLERK
JUDGMENT ENTD JAN 28, 2002
DEPUTY CLERK

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on August 17, 2001, pursuant to the parties cross- motions for summary judgment, motions by both parties to exclude certain expert testimony and affidavits, and Plaintiff's Motion to Withdraw and Amend its Responses to Defendants' Requests for Admissions. For the reasons set forth below: (1) Plaintiff's Motion to Amend and Withdraw is denied; (2) Plaintiff's Motion for Summary Judgment is denied; (3) Defendants' Motion for Summary Judgment is granted; and (4) the parties' respective motions to exclude certain expert testimony are denied as moot.[2]

Background

The parties were previously before the Court on December 8, 2000, pursuant to Plaintiff's Motion for a Preliminary Injunction. The Court denied Plaintiff's motion, and the parties are now back before the Court on the parties' Cross- Motions for Summary Judgment and the parties' various motions to exclude certain expert testimony. The Court will again summarize the relevant facts.

Plaintiff Luigino's, Inc. ("Luigino's") is a privately-

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[2] The parties have filed numerous motions to exclude certain expert testimony. However, the Court does not need to reach the merits of these motions in order to decide the merits of the parties' cross-motions for summary judgment. Even if the Court were to consider the testimony of the contested experts, the Court's determinations on the motions for summary judgment would be no different. While much of the contested testimony relates to the issue of damages, the issue of causation, *i.e.*, not whether the success of Jose Ole caused the damage, but whether the alleged misconduct was causally related, as will be addressed by the Court below, however, remains the fatal element of the majority of Plaintiff's claims.

owned Minnesota corporation of which the primary business is the wholesale production of frozen food entrees for retail sale, sold mainly under the trade name "Michelina's." In 1998, Luigino's engaged in negotiations with Defendant IBP, Inc. ("IBP"), for the sale of Luigino's to IBP. IBP is involved primarily in the packaging of meat products for sale at grocery stores nationwide, and it is the parent corporation of numerous subsidiary corporations. Defendant Robert Peterson was and continues to act as the CEO and Chairman of the Board for IBP, and thus, was directly involved in the negotiations with Luigino's. Larry Shipley, the Chief Financial Officer of IBP, was also involved in the negotiations with Luigino's. While no agreement was ever reached, the parties continued to entertain possibilities through April 2000.

In order to facilitate the sale, Luigino's engaged the investment banking firm Goldsmith, Agio, Helms & Co. ("GAHC"). During the negotiations, GAHC provided to IBP a Confidential Memorandum that provided an overview of Luigino's business, including its financial structure and potential growth opportunities, concluding that IBP was not a direct competitor of Luigino's. (Plaintiff's Memorandum in Support of Summary Judgment, p. 3) (hereinafter "Plaintiff's Memo in Support"). By way of contrast, Plaintiff considered entities Heinz, ConAgra, and Nestle to be competitors in the frozen food industry and thus either did not provide a Confidential Memorandum or at least provided a redacted copy of the Confidential Memorandum.[3] Defendants contend, and Plaintiff does not contest that, upon issuing the Confidential Memorandum, Plaintiff was well aware of the

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[3] As the Court stated at footnote 1 in its December 13, 2000, Memorandum Opinion and Order, the Court has yet to receive a copy of a redacted Confidential Memorandum, despite Plaintiff's representation that one was provided as "Exhibit B" to Affidavit Ronald O. Bubar, filed in support of Plaintiff's Motion for a Preliminary Injunction.

various business ventures of IBP, including the presence of a subsidiary, Foodbrands-owner of Specialty Brands ("SBI"), which is involved in the retail frozen Mexican food market.

As of 1998, Foodbrands manufactured hand-held frozen tacos, burritos, and snack items primarily for sale in delis, convenience stores, and warehouse clubs, but typically not for sale in the traditional frozen food aisle of grocery stores. Since 1995, SBI sold frozen Mexican food under the brand names: Butcher Boy, Posada, Little Juan, and Marquez. Indeed, in April 1996, Luigino's ordered several cases of SBI's frozen products which included items packaged for retail sale under the Posada brand. Luigino's placed additional orders for SBI's Mexican products in February and September 1999. Moreover, GAHC had a copy of IBP's 1997 Annual Report which included information relating to SBI's "Mexican Specialty Products."

In early 1998, the Luigino's Confidential Memorandum was provided to IBP pursuant to a Confidentiality Agreement entered into by the parties, which states in relevant part that:

* * *

> 2. . . . [IBP's] obligation hereunder to hold the information confidential does not apply to: (a) information which is published or otherwise becomes available to the general public through no act or failure to act on the part of [IBP]; (b) information which is proprietary known to [IBP] at the time of disclosure; (c) information which is subsequently acquired by [IBP] from a third party who has a bona fide right to make such information available without restriction or (d) information developed

> independently by [IBP's] employees who are not privy to "information."
>
> 3. [IBP] agrees to share confidential information concerning [Luigino's] with a limited number of [IBP's] employees or directors, on a need-to-know basis only, and will not disclose the information, including the identity of [Luigino's] to any other party, unless and until approved in writing by [Luigino's].
>
> * * *
>
> 6. This information shall not be disclosed to any agent, consultant or third party unless they agree to execute and be bound by the terms of this AGREEMENT and have been previously approved by GAHC and [Luigino's] in writing.
>
> * * *

Plaintiff maintains that the Confidentiality Agreement was breached because IBP provided the Confidential Memorandum to unauthorized persons such as Bain & Company and Donaldson Lufkin & Jenrette, IBP's consultants for the potential purchase of Luigino's; Randy Devening, President of Foodbrands; and Patrick O'Ray, President of SBI. Plaintiff makes particular note of the fact that Bain and Company was also dealing with O'Ray of SBI. O'Ray states that he has had contact with Bain and Company on only two occasions, once via a short telephone call in December 1998 relating to an acquisition of a business unrelated to the IBP/Luigino's negotiations, and again in 2000 to discuss a potential e-commerce project. Plaintiff also contends that although Devening thought Luigino's would fall under his control if it was purchased, Shipley and Peterson deny this possibility. However, Plaintiff points to no

evidence in the record to support such a contention.

Because the parties ultimately could not agree on a purchase price nor a structure for the transaction, in December 1998, Luigino's initiated a public sale of bonds in order to raise $100 million for the company. Plaintiff contends that the bond underwriters recommended that Luigino's invite outside directors to join the board. In a December 23, 1998, letter from Jeno Paulucci, the owner and CEO of Luigino's, Defendant Peterson was invited to join Luigino's advisory board of directors in order to "keep an eagle eye on the business." By a December 29, 1998, letter, Paulucci acknowledged Peterson's acceptance of his invitation to join the newly established board and indicated that they would be seeing each other shortly after the new year.

In January 1999, Luigino's asked Peterson to complete a questionnaire provided to each board member to elicit "certain information required to be disclosed in the [Bond] Offering Memorandum." Plaintiff maintains that Peterson's seat on the board was conditioned upon his responses to the questionnaire. To the question: "Are you aware of any services or products of any other company on whose board you sit which could be regarded as competitive with those of [Luigino's]?; Peterson answered "No." However, in a space left for explanations relating to an answer of "Yes," Peterson went on to state: "IBP and its subsidiaries manufacture food products, however, none of these products directly compete with [Luigino's]." By early 1999, Peterson joined the Advisory Board of Directors, and by Summer 1999, Peterson was named Vice Chairman, pursuant to Paulucci's request as evidenced in a July 13, 1999, letter.

During the course of his involvement on the board,

Mr. Peterson attended quarterly board meetings. The parties dispute the nature and extent of information to which Peterson was exposed during these meetings. The most relevant disputed topic relates to discussions of potential product lines of Mexican or Southwestern frozen entrees, namely the "Howlin' Coyote" product line acquired by Luigino's in 1999. "Howlin' Coyote" is a Southwestern frozen food product line, consisting of six frozen chilis and three bottled salsas. Plaintiff maintains that during the July 1999 board meeting and perhaps also the April 1999 meeting, Peterson received information, primarily by way of a PowerPoint presentation by Joel Kozlak, CFO of Luigino's, that Luigino's was intending to use Howlin' Coyote as a "beachhead" for a broader product line of Mexican frozen foods and entrees. In support of this contention, Plaintiff cites to the depositions of Kozlak and Larry Nelson, President of Paulucci International. While Nelson does maintain that the presentation was given at the July meeting, his recollection is dim, as evidenced by counsel's questioning and the deponent's responses; and the portions of Kozlak's deposition that have been included in the record contain absolutely no evidence to support Plaintiff's contention, but rather explain that such a presentation was likely provided in Kozlak's presence at a sales meeting at which Peterson was not alleged to have been present.[4]

In February 2000, Specialty Foods, Inc., the aforementioned subsidiary of IBP, launched "Jose Ole," a new product line of premium priced Mexican frozen entrees. Luigino's became aware of the product line through reports in

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[4] While the Court makes no judgment as to whether the presentation occurred as Plaintiff contends, the Court reminds counsel that a portion of the record should only be cited for that which it can reasonably be read to represent, and no more. The density of a record in any given case is no excuse for citations that are imprecise, inaccurate, or wholly unfounded.

a trade magazine, and it subsequently removed Mr. Peterson from the Board for his alleged breach of fiduciary duty, having failed to disclose his corporation's competitive endeavor. Defendants contend that Mr. Peterson was unaware of Specialty Foods' development and launching of the "Jose Ole" line until February 2000 when SBI made a capital expenditure request of the IBP board. Plaintiffs respond alleging that Mr. Peterson had to have been aware of "Jose Ole" and the relevant conflict given his directorial and financial responsibilities and his inevitable interactions with Larry Shipley, who sat on the board of Foodbrands and who also was intimately involved in the negotiations with Luigino's.

SBI's Launch of Jose Ole

Defendants contend that the idea for Jose Ole began back in 1995 when Patrick O'Ray became president of SBI. In 1997 and early 1998, O'Ray assembled a team of individuals to develop an umbrella brand for the various lines of frozen foods already manufactured by SBI. Robert Berry was hired as Marketing Director for SBI in July 1998, and Defendants maintain that he forthwith conducted market research that was ultimately relied upon in launching Jose Ole. Berry issued a 10-chapter marketing plan in 1999 that recommended in part: (1) "Develop first consumer-focused brand to capitalize on under-developed frozen Mexican food segment." and (2) Develop new products, such as "appetizers/snacks (2-3 SKUs; mini burritos, stuffed nachos, pocket sandwiches, etc.; handheld entrees (4-5 SKUs); burritos, chimichangas, gorditas, taquitos, etc.; dinners/entrees (2-3 SKUs); casseroles/bakes, chicken bowls, tamale pies, Mexican pizzas, chilis, etc."

In December 1998, Randy Devening, CEO of Foodbrands, and O'Ray met with Shipley in order to review

SBI's business plan for 1999 which included expenses for Project Phoenix, the name for the research and development project that resulted in the launch of Jose Ole. Defendants maintain that consultants were paid over $3 million in the development of Jose Ole, but that such expenditures did not require approval of the IBP board because research and development costs are not considered capital expenditures. As a result, Defendants contend that Defendant Peterson first heard about the Jose Ole product line when SBI submitted a capital expenditure request to the IBP board on February 18, 2000.

As stated above, the Jose Ole line was launched in April 2000. In June 2000, Nestle also launched a line of Mexican frozen foods, akin to the Jose Ole line, under the name brand Ortega.

Luigino's Experience with Mexican Frozen Food and Howlin' Coyote

While Luigino's never consistently pursued a Mexican frozen food line prior to the launching of Jose Ole, it did experiment with the Carlos & Maria's line which it abandoned in 1995-1996. Mr. Paulucci stated during his deposition that Carlos & Maria's was abandoned because "it was not profitable because of the low image of Mexican food." Mr. Paulucci went on to explain that it was this image that prompted Luigino's to consider the Howlin' Coyote line which it designated as Southwestern, a potentially lucrative "departure" from "strictly Mexican." Luigino's acquired the Howlin' Coyote line in January 1999 and, in the minutes from the April 1999 board meeting, described the line as Southwestern/Caribbean/Cajun. In September 1999, in conjunction with its order of SBI Mexican products, Luigino's invited an SBI representative to tour its Ohio manufacturing plant and explained its interest in possibly

using SBI products for the new Howlin' Coyote line. Ultimately, however, as expressed in a January 2000, memorandum sent to GAHC, Kozlak, and Ron Bubar, President of Luigino's, Paulucci indicates that Luigino's would not be "pushing" Howlin' Coyote in 2000, given slotting fees, but that, pending market test results, the line would be promoted further in 2001 and later years. On June 14, 2000, in an internal memorandum from Ron Bubar to Joel Conner, Luigino's suspended expansion of the Howlin' Coyote because of the perceived success and strong financial backing of the Jose Ole and Ortega lines. Luigino's now markets a line of frozen Mexican foods under the brand name, Michelina's Fiesta.

Discussion

1. Plaintiff's Motion to Withdraw and Amend Responses to Defendants' Request for Admissions

Plaintiff submits its Motion to Withdraw and Amend based on an alleged scrivener's error. On May 30, 2001, Defendants served upon Plaintiff 397 discovery requests for admissions. Plaintiff submitted 396 responses to Defendants' requests on June 29, 2001. However, on August 10, 2001, seven days before the hearing on the parties' cross-motions for summary judgment, Plaintiff submitted this motion, maintaining that it inadvertently failed to respond to Defendants' request number 161, and, as such, each of the subsequent responses actually corresponds with one number greater request.

Rule 36(b) of the Federal Rules of Civil Procedure provides that: "the court may permit withdrawal or amendment [of admissions] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that

withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." The Court agrees with Defendants' position that an amendment as Plaintiff has requested would substantively change the admissions to a substantial portion of Defendants' requests. In contrast, Plaintiff has pointed to no specific admission which, without amendment, would compromise its ability to defend its position on the merits of this case. Such a careless oversight no doubt compromises the reliability and ultimate usefulness of the admissions for either party. Nonetheless, in order for the Court to reach its decision on the merits, as outlined below, the Court did not rely in any way on Plaintiff's admissions, but instead relied upon facts otherwise established by the record. The Court declines to allow Plaintiff to withdraw and amend its admissions, but even if the Court were to determine such amendment to be appropriate, the Court's ultimate decision on the merits would remain the same.

2. Defendants' Motion for Summary Judgment

a. Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank v. Magna Bank of Missouri,* 92 F.3d 743, 747 (8th Cir.1996). However, as the Supreme Court has stated, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" Fed.R.Civ.P. 1. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enterprise Bank,* 92 F.3d at 747. The nonmoving party must demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986); *Krenik,* 47 F.3d at 957.

b. Issues

i. Negligent Misrepresentation

Plaintiff bases its claim of negligent misrepresentation on Defendant Peterson's response to a questionnaire in support of a bond offering in 1999, indicating that IBP should not be regarded as "competitive" and stating that "IBP and its subsidiaries manufacture food products, however, none of these products directly compete with [Luigino's]."[5] Defendants contend that Defendant Peterson's statement was truthful, and irrespective of its truthfulness, Luigino's purported reliance on the statement upon making the alleged disclosure of confidential and proprietary information was unreasonable.

As set forth in the Section 552 of the Restatement (Second) of Torts and as adopted by the Minnesota Supreme Court, in order to establish a claim of negligent

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[5] In light of the March 23, 2001, Order in this case, the only statement upon which Plaintiff has been permitted to base a claim of negligent misrepresentation is the statement addressed by the Court in its analysis above.

misrepresentation, a plaintiff must establish the following elements:

(1) One who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in subsection (3), the liability stated in subsection (1) is limited to loss suffered

(a) By the person or one of the persons for whose benefit and guidance he intends to supply the information, or knows that the recipient intends to supply it; and

(b) Through reliance upon it in a transaction which he intends the information to influence, or knows that the recipient so intends, or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the

> transactions in which it is intended to protect them.

Bonhiver v. Graff, 248 N.W.2d 291, 298-99 (1976) (quoting Restatement (Second) of Torts § 552). In sum, Luigino's must establish that Peterson's statement on the questionnaire was false, that he intended Luigino's to rely on the statement to its detriment, and that indeed Luigino's did rely on the statement.

Luigino's maintains that Peterson's statement is false because it did not reveal the existence of the Jose Ole line.[6] However, Luigino's has presented no evidence to show that, in January 1999, Peterson was at all aware of Project Phoenix or the Jose Ole line. Luigino's has only made conclusory allegations that because Larry Shipley allegedly knew of the project, that Peterson also must have known and that because Peterson is the CEO of IBP, that he also must have known about the endeavors of the subsidiary SBI. As a matter of law, such conclusory allegations cannot give rise to a reasonable inference that Peterson knew about the Jose Ole line. The parties spend significant time in their discussion of this claim, and others, disputing their respective definitions of competition and the extent to which these definitions varied over time and thus impact their relative positions on the merits. Nonetheless, the Court does not find that a dispute

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[6] While Plaintiff's position has not always been clear to the Court, the Court does not read Plaintiff's argument on this claim to imply that Peterson's statement was false with respect to whether the pre-Jose Ole SBI frozen foods, *i.e.,* hand-held items already for retail sale, compete with Michelina's frozen entrees. Despite the vacillation of definitions for competition that have been presented throughout this case, however, Luigino's has admitted that it was aware of the pre-Jose Ole SBI items and did not deem them competitive with Michelina's products. Accordingly, Peterson's answer and explanatory statement is not inconsistent with Luigino's admitted position on the extent to which SBI competed with Luigino's before the launch of Jose Ole.

in definition determines the outcome on this claim. Whether Jose Ole does or does not compete with Michelina's based on ethnicity, price point, or mere presence in the frozen food aisle, Luigino's has presented no evidence that could support the allegation that Peterson knew about Jose Ole at the time that he responded to the questionnaire.

The Court's analysis could end there. However, Plaintiff has also failed to direct the Court to any evidence to support its allegations that Peterson intended that Luigino's rely on his statement nor that Luigino's did rely on that statement in keeping Peterson on the advisory board and allegedly divulging proprietary information, resulting in damage to Luigino's. Again, Plaintiff's allegations are wholly conclusory and unsupported by any evidence in the record that could reasonably support any such inferences. On its face, the questionnaire was intended to elicit information from board members for the purpose of compiling the bond offering memorandum. Plaintiff now makes the claim that it relied on this statement in placing Peterson on the board. Given the timing of Paulucci's invitation to Peterson to serve on the board and his subsequent acknowledgment of Peterson's acceptance, a trier of fact could not reasonably conclude that the questionnaire was a precondition to service. However, even construing Plaintiff's argument to mean that Luigino's would not have kept Peterson on the board had it known of Jose Ole, Plaintiff has still directed the Court to no evidence in the record that could support the inference that Peterson intended Luigino's to rely on his statement to its detriment.

In sum, the Court finds that Plaintiff has failed to create a genuine dispute of material fact with respect to Peterson's statement on the bond offering questionnaire as it relates to Plaintiff's claim of negligent misrepresentation. According, the Court shall dismiss Plaintiff's claim of

negligent misrepresentation with prejudice.

ii. Misappropriation of Trade Secrets

a. In General

Luigino's alleges that Peterson and IBP misappropriated trade secrets in two ways: (1) by Peterson's presence on the Luigino's board of directors; and (2) by information exchanged between Luigino's and IBP during the purchase negotiations. In its memorandum in opposition to Defendants' motion for summary judgment, Luigino's contends that Peterson was exposed to the following trade secrets: "(1) the details pertaining to the launch of Howlin' Coyote; (2) Luigino's top 10 customers by volume; and (3) Luigino's research and development information." The following information are the alleged trade secrets Luigino's contends were revealed to IBP during the negotiations: "(1) the Offering Circular; (2) Luigino's financial information; (3) a second Offering Circular pertaining to snack items; (4) income statements and documents reflecting volume and sales margins; and (5) EBITDA projections for Luigino's through 2004."

b. "Trade Secret"

Under the Minnesota Uniform Trade Secrets Act, a trade secret is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper

means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Minn.Stat. § 325C.01, subd. 5. In determining whether an item is a trade secret, courts in this District require that a party establish the following three factors: (1) the information must not be generally known or readily ascertainable; (2) the information must derive independent economic value from secrecy; and (3) the party asserting the misappropriation must have made reasonable efforts to maintain secrecy of the item. *Lasermaster Corp. v. Sentinel Imaging, a Div. of Sentinel Business Systems, Inc.*, 931 F.Supp. 628, 635 (D.Minn.1996) (citations omitted). Although absolute secrecy is not required, the confidential measures must be "reasonable under the circumstances." *Id.* (citations omitted).

In order to successfully seek protection of a trade secret, a plaintiff must identify the trade secret with sufficient specificity so that appropriate relief may be granted. *Porous Media Corp. v. Midland Brake, Inc.*, 187 F.R.D. 598, 600 (D.Minn.1999) ("Failure to identify the trade secrets with sufficient specificity renders the Court powerless to enforce any trade secret claim."); *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897-98 (Minn.1983). Several of Plaintiff's alleged trade secrets are merely general categories of information, namely: (1) Luigino's research and development information; (2) Luigino's financial information; and (3) income statements and documents reflecting volume and sales margins. As evidence of these alleged trade secrets, the Plaintiff directs the Court to deposition testimony of Larry Nelson and Boyd Bulger, a

vice president of Foodbrands. While the Court recognizes that the cited testimony relates to specific documents falling within the aforementioned categories, the referenced documents have not been presented to the Court for evaluation, and instead Plaintiff bases its arguments on general categories for which, as a matter of law, trade secret status would be improperly applied.

Moreover, to the extent that the deposition documents actually are the trade secrets for which Plaintiff seeks protection, the Court understands Plaintiff's argument to focus on the confidentiality agreement governing the parties' negotiations and a parallel responsibility attributed to Peterson as a member of the Luigino's board rather than the proprietary nature of the information contained in these documents. As the Minnesota Supreme Court stated in *Electro-Craft:* "In defining the existence of a trade secret as the threshold issue, we first focus upon the "property rights" in the trade secret rather than on the existence of a confidential relationship." *Electro-Craft,* 332 N.W.2d at 897. The *Electro-Craft* court went on to explain that while a confidential relationship is also a prerequisite to a misappropriation claim and should not be "artificially separated" for purposes of analysis, to find a trade secret based only on a confidential relationship would "come dangerously close to expanding the trade secret act into a catchall for industrial torts." *Id.* Accordingly, the Court finds that: (1) Luigino's research and development information; (2) Luigino's financial information; and (3) income statements and documents reflecting volume and sales margins, are not trade secrets, and to the extent that Plaintiff seeks to protect the use of the information in these general categories, Plaintiff's claims of breach of contract and breach of fiduciary duty provide the appropriate avenue for remedy.

With respect to the remaining alleged trade secrets:

(1) the details pertaining to the launch of Howlin' Coyote; (2) Luigino's top 10 customers by volume; (3) the Offering Circular; (4) a second Offering Circular pertaining to snack items; and (5) EBITDA projections for Luigino's through 2004;" the Court finds that genuine disputes of fact remain as to whether such information has independent economic value from secrecy and was not generally known or readily ascertainable, and whether Plaintiff took reasonable efforts to maintain its secrecy. As such, while the evidence is certainly not clear nor overwhelming, the Court finds that a reasonable trier of fact could find that each of the above five pieces of information is a trade secret.

The Court's analysis, however, cannot stop there. Even if certain information could be found by a trier of fact to warrant trade secret status, the Court must still evaluate whether a trier of fact could also find that such trade secrets were misappropriated.

c. "Misappropriation"

Misappropriation is defined by statute as:

(i) [the] acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew

> or had reason to know that the discloser's or user's knowledge of the trade secret was
>
> (I) derived from or through a person who had utilized improper means to acquire it;
>
> (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
>
> * * *

Minn.Stat. § 325C.01, subd. 3. "Improper means" is defined as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic means." Minn.Stat. § 325C.01, subd. 2.

With respect to Defendant Peterson and any information he may have received as a member of the Luigino's board, as the Court explained in its evaluation of the previous claim and as it will elaborate further below, Plaintiff has directed the Court to no evidence that Peterson made a misrepresentation on the questionnaire nor that he knew of the Jose Ole line. Moreover, Plaintiff has failed to direct the Court to any evidence in the record that Peterson used any information to somehow promote the development and ultimate launch of Jose Ole. The only evidence that Plaintiff points to is deposition testimony of Larry Shipley that states that Peterson told Shipley that Luigino's purchased Howlin' Coyote. As a matter of law, this communication, without more, however, is not a trade secret and cannot support an inference that Peterson somehow misappropriated certain proprietary information.

With respect to the information shared during the negotiations, Plaintiff also fails to direct the Court to any evidence that could reasonably support an inference that Peterson or IBP used such information to launch Jose Ole. Even if individuals such as Devening, O'Ray, and Shipley had knowledge of the Offering Memorandum, Plaintiff has made no competent showing of how such information was used to launch Jose Ole in competition with it. While the Court recognizes that misappropriation is often difficult to prove by direct evidence and is instead often established by a cumulation of circumstantial evidence, the Court still finds that Plaintiff directs the Court to no more than conclusory allegations and the timing of the Jose Ole launch, and, without more, there are insufficient facts that, if proven, could support an inference of misappropriation. Plaintiff fails to identify which information was used, how it was used, and what circumstantial evidence within the Jose Ole product line serves to indicate either, especially when several of the products within the Jose Ole product line are simply repackaged varieties of SBI's previous products, *e.g.*, burrito, fajita burrito, chimichangas, wraps, and taquitos. To the extent that Jose Ole incorporates additional products not previously produced by SBI, such as bowls, there is no evidence that the ideas for these products were the property of Luigino's. To the contrary, the record reflects that frozen food served in bowls was already present in the frozen food market.

Moreover, the Court finds it of particular note that the parties contemplated the possibility that a competing product line or business practice could be independently developed by IBP, without risking violation of the Confidentiality Agreement. Plaintiff's conclusory allegations, without more, cannot rebut the evidence that SBI independently developed Jose Ole without the knowledge and assistance of any

information acquired by IBP. For the above reasons, the Court finds summary judgment to be appropriate on Plaintiff's claims of misappropriation.

iii. Breach of Fiduciary Duty

Plaintiff's breach of fiduciary claim is closely related to its claim of misappropriation and is subject to the same infirmities. Plaintiff alleges that Defendant Peterson breached his fiduciary duty as a member of Luigino's board of directors by: "(1) splitting his loyalties by serving on the Luigino's Board on behalf of IBP without Luigino's knowledge; (2) engaging in developing a directly competitive [product] [*sic*] (to Luigino's) business through IBP; and (3) usurping the corporate opportunity of Jose Ole from Luigino's." Simply because a director of one company is also a director of another company with a competing interest does not render the director in breach of his fiduciary duties. *Astarte, Inc. v. Pacific Indus. Sys., Inc.*, 865 F.Supp. 693, 705 (D.Colo.1994) ("Multiple Loyalties do not, *per se*, constitute a breach of fiduciary duty."). While such relationships may rightly cause a court to look more closely at the director's conduct for evidence of breach, the relationships alone are insufficient to support a claim for breach of fiduciary duty. In the instant case, even if Peterson made the statement that he sat on the Luigino's board as a representative of IBP, Plaintiff was well aware of the business interests of IBP, including its frozen food line (except for the prospective Jose Ole) and indeed invited Peterson to serve on the board. To the extent that Plaintiff is arguing that Peterson's conflicting interest was the Jose Ole product line, as the Court has stated before, Plaintiff has failed to present evidence that would support a finding that Peterson knew of its development and kept such knowledge from Luigino's.

In order to establish a colorable claim for breach of

fiduciary duty, Plaintiff would have to show that Peterson improperly used his position on the Luigino's board to promote the development and launch of Jose Ole or, conversely, to hinder Luigino's from pursuing Howlin' Coyote, Carlos & Maria's, Michelina's Fiesta, or any other such product line that could be considered to be in competition with Jose Ole. The Court makes no attempt to settle the raging dispute over which frozen food items compete with which. As the Court has previously stated, the parties' definitions, particularly the Plaintiff's, have vacillated over the course of this litigation. Nonetheless, irrespective of which definition of "competition" is appropriately applied, Plaintiff has made no showing that Peterson used any information he gained as a board member, or, for that matter, any experience or information he gained in *any* capacity to facilitate the launch of Jose Ole, nor that he used his position on the board to thwart Luigino's foray into the Mexican market.

With respect to whether Peterson usurped a corporate opportunity, Luigino's must establish that: (1) the business opportunity to launch the Jose Ole product line was a corporate opportunity within Luigino's "line of business"; and (2) Peterson violated his fiduciary duties of loyalty, good faith, and fair dealing toward Luigino's. *Miller v. Miller*, 222 N.W.2d 71, 81 (Minn.1974). In determining whether a business opportunity is a corporate opportunity, a finder of fact must look to the totality of the circumstances. *Id.* The Minnesota Supreme Court has held that a corporation can have no interest and a fiduciary may thus take advantage of an opportunity, if: (1) a corporation declines, because of legal barriers, to avail itself of the opportunity; *or* (2) it is the settled policy of the corporation not to engage in a particular line of business; *or* (3) the corporation has declined the opportunity for business reasons; *or* (4) the opportunity is not available to the corporation either because a party refuses to

deal with it or because the corporation sought, but without success, to obtain it; *or* (5) in some other instances which might render the opportunity extraneous to the corporation's business. *Diedrick v. Helm*, 14 N.W.2d 913, 920 (Minn.1944).

The undisputed facts show that Luigino's declined the pursuit of a Mexican frozen food line whether by ceasing production of Carlos & Maria's, by declining to sell products other than those that could be deemed Southwestern/Caribbean/Cajun, or by declining to promote Howlin' Coyote in 2000, either as a "departure from Mexican" or as a predecessor to any Mexican line like Michelina's Fiesta. Plaintiff has failed to direct the Court to any evidence of Michelina's Fiesta product line or the prospect of any such line that pre-dates the launch of Jose Ole. Luigino's relies solely on the alleged presentation by Kozlak that Howlin' Coyote was intended to be a beachhead for a broader product line that would include Mexican frozen foods such as those now sold as Michelina's Fiesta. However, Plaintiff provides no explanation for Paulucci's decision to sideline Howlin' Coyote in January 2000 before he knew of the existence of Jose Ole.

Nonetheless, even if a trier of fact could find that Jose Ole is a corporate opportunity that Luigino's had not already rejected, Plaintiff, as a matter of law, has alleged insufficient evidence that could support a finding that Peterson breached his fiduciary duties of loyalty, good faith, and fair dealing. Plaintiff has made no showing that Peterson somehow used any information or experience that he gained as a Luigino's board member in order to develop and launch the Jose Ole line. Moreover, Plaintiff has failed to make a showing that Peterson even knew of the Jose Ole line as it was being developed. The only evidence that Peterson even knew of Jose Ole is that he, as a board member of IBP, was asked to

approve a capital expenditure to launch Jose Ole. Even if Peterson's fiduciary responsibilities obligated him to disclose the launch of the Jose Ole line once he was made aware of its existence in January 2000, Plaintiff can make no colorable claim that such a failure was the cause of any damages experienced by Luigino's. While the presence of Jose Ole in the frozen food market may have impacted Luigino's financial success in some way, Plaintiff can prove no causal link through Peterson's presence on Luigino's board nor even by his failure to alert Luigino's of the launch of Jose Ole.

iv. Breach of Contract

Plaintiff's breach of contract claim relates to the Confidentiality Agreement and Plaintiff's contention that IBP breached the agreement by allowing third-party consultants and certain IBP employees unauthorized access to the Confidential Memorandum, without the requisite written permission of Luigino's or the "need-to-know basis." Specifically, Plaintiff contends that: (1) Defendant IBP failed to obtain written permission before disclosing the Confidential Offering Memorandum and "detailed financial information" to IBP's consultant, Bain & Company; and (2) IBP wrongfully disclosed the Offering Memorandum to Randy Devening because he did not *need to know* its contents.

The parties do not dispute that the Confidentiality Agreement imposed a duty upon IBP to maintain the confidentiality of proprietary information exchanged within the course of the Luigino's/IBP negotiations. The parties do dispute, however, whether that agreement was breached, given how information was exchanged and to whom. With respect to the provision of the Offering Memorandum to Randy Devening, Defendants maintain that it was done on a need-to-know basis. Plaintiff's only response is to assert that

Shipley and Peterson "flatly" contradict Devening's belief that Luigino's, if acquired, would fall under his control of Foodbrands. In support of this contention, however, Plaintiff's only cite to the record yields no support whatsoever. Indeed, the subject matter cited, a colloquy between the counsel present at deposition, is completely irrelevant to the Plaintiff's position. Plaintiff further provides no alternative explanation why the input of Devening, the president of IBP's frozen food subsidiary, would not be integral to IBP's decision-making process. Plaintiff has failed to create a dispute of fact with respect to whether IBP breached its agreement by providing the memorandum to Devening.

With respect to the information provided to Bain & Company, Defendants maintain that Luigino's waived the constraint of the agreement because IBP requested coverage of Bain & Company under the agreement, and Luigino's freely provided information to Bain & Company during meetings and via correspondence. Plaintiff does not dispute Defendants' explanation, but, rather, contends that the lack of written permission constitutes a clear breach of the agreement and that Patrick O'Ray's communications with Bain & Company somehow indicate that information was used in competition against Luigino's. There is no evidence in the record that, in response to IBP's request, Luigino's actually provided written consent to include Bain & Company under the Confidentiality Agreement. There is also no evidence in the record that O'Ray's communication with Bain & Company had anything to do with the acquisition of Luigino's. There is evidence in the record, however, that Luigino's knowingly participated in meetings at which a representative of Bain & Company was present and knowingly provided information for review by Bain & Company. To now argue breach based upon conduct that Luigino's arguably knowingly and voluntarily facilitated

rings hollow with the Court. However, even to the extent that Plaintiff has created an issue of fact with respect to disclosure to Bain & Company, Plaintiff has failed to address a crucial element to its claim-an alleged causal link between the alleged breach and damages.

Plaintiff maintains that because it seeks summary judgment only on the elements of duty and breach, the Court need not reach the issues of causation and damages. However, Plaintiff has failed to make even the sparest allegations that, if found to be true, would support a finding that any disclosure was the direct or proximate cause of any damage to Luigino's. Moreover, even barring the issue of causation and assuming that the alleged wrongful result was the launch of Jose Ole, Plaintiff has not identified what information within the Offering Memorandum or within the vague category of "detailed financial information" was somehow used to launch Jose Ole. Indeed, Plaintiff's only rebuttal against the contention and supporting evidence that Jose Ole was independently developed is a conclusory denial. Even if the Court were to find that Plaintiff has made a colorable showing of duty and breach, the Court cannot find that Plaintiff has alleged any set of facts which, if proven, could reasonably be found to provide a causal link to Plaintiff's alleged damages.

3. Conclusion

Based on the foregoing reasons, the Court finds that, as a matter of law, Plaintiff has failed to create a material dispute of fact on any of its claims, and, as such, summary judgment in favor of Defendants is appropriate. Essentially, Plaintiff has attempted to persuade the Court that the circumstances surrounding the launch of Jose Ole are enough to create an inference of impropriety and thus a dispute of fact on each of its claims. Plaintiff has failed, however, to

assert facts that could support a finding of a causal link between any alleged impropriety and alleged damages. The record before the Court is certainly dense and complex, and it is clear that the parties disagree as to many of the facts within it. However, the crucial facts of causation are fatally omitted from Plaintiff's case, and the Court, upon its extensive review of the record, finds insufficient evidence on the issue as a matter of law. The Court's ruling is not inconsistent with the principle that circumstantial evidence is often the only evidence available to prove such claims as Plaintiff has asserted here. However, even with this principle in mind, the Court finds summary judgment to be wholly appropriate.

For the reasons stated, **IT IS HEREBY ORDERED** THAT:

1. Plaintiff's Motion to Withdraw and Amend Responses to Defendants' Requests for Admissions (Doc. No. 170) is **DENIED**;

2. Plaintiff's Motion for Summary Judgment (Doc. Nos. 100 & 130) is **DENIED**;

3. Defendant's Motion for Summary Judgment (Doc. No. 143) is **GRANTED**;

4. Plaintiff's *Daubert* Motion to Exclude the Testimony and Opinion of Defendants' Expert, Cate Elsten (Doc. No. 137) is **DENIED AS MOOT**;

5. Defendants' Motion to Strike the Expert Opinions and Report of Donald Nicholson (Doc. No. 159) is **DENIED AS MOOT**;

6. Defendants' Motion to Strike the Expert Opinions and Report of Gordon Wade (Doc. No. 155) is

DENIED AS MOOT;

7. Defendants' Motion to Strike the Expert Opinions and Report of Professor John C. Matheson (Doc. No. 151) is **DENIED AS MOOT**; and,

8. The Second Amended Complaint (Doc. No. 95) is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 28, 2002 s/ DONOVAN W. FRANK
DONOVAN W. FRANK
Judge of United States
District Court

APPENDIX E

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution

. . . .

[ARTICLE VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX F

Rule 38. Jury Trial of Right.

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

APPENDIX G

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating

counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions

to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX H

MINNESOTA STATUTES ANNOTATED
TRADE REGULATIONS, CONSUMER PROTECTION
CHAPTER 325C. UNIFORM TRADE SECRETS ACT

325C.01. Definitions

Subdivision 1. As used in sections 325C.01 to 325C.07, the terms defined in these sections have the meanings given them, unless the context requires otherwise:

Subd. 2. "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

Subd. 3. "Misappropriation" means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that the discloser's or user's knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to

maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of the discloser's or user's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Subd. 4. "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

Subd. 5. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret is not negated merely because an employee or other person has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained.

APPENDIX I

MINNESOTA STATUTES ANNOTATED
TRADE REGULATIONS, CONSUMER PROTECTION
CHAPTER 325C. UNIFORM TRADE SECRETS ACT

325C.02. Injunctive relief

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

APPENDIX J

MINNESOTA STATUTES ANNOTATED
TRADE REGULATIONS, CONSUMER PROTECTION
CHAPTER 325C. UNIFORM TRADE SECRETS ACT

325C.03. Damages

(a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under paragraph (a).

Supreme Court, U.S.
FILED
JUL 3 0 2003
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No. 03-10

In The
Supreme Court of the United States

LUIGINO'S, INC.,

Petitioner,

v.

IBP, INC. and ROBERT PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision by the Eighth Circuit Court of Appeals properly affirmed the grant of summary judgment on Petitioner's state law claims under the standards of this Court's 1986 trilogy *Celotex*, *Liberty Lobby*, and *Matsushita*, where the Petitioner failed to present evidence of genuine disputed facts on an issue for which it bore the burden of proof namely, causation?

2. Whether this Court should grant the Petition for Writ of Certiorari where this case involves only state law claims and no split among the federal circuit courts of appeals, simply to revisit the summary judgment standards set out in the 1986 trilogy *Celotex*, *Liberty Lobby*, and *Matsushita*?

RESPONDENTS' RULE 29.6 DISCLOSURE

Tyson Foods, Inc., a publicly held, Delaware corporation, owns ten percent or more of the stock of Respondent IBP, inc. Tyson Foods, Inc. is the only parent of IBP, inc.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court in an opinion issued on January 30, 2003. The Court of Appeals denied Petitioner's Petition for Rehearing on April 1, 2003. The Petition for Writ of Certiorari was docketed in this Court on June 30, 2003.

RELEVANT AUTHORITY INVOLVED

Petitioner lists the Seventh Amendment to the Constitution, U.S. Const. Amend. VII, and the procedural requirement for a jury trial demand, Fed. R. Civ. P. 38 (a), as relevant authority. Petitioner's Br. at 2. However, neither provision was raised before the Court of Appeals for the Eighth Circuit or the District Court for the District of Minnesota as a basis for denying Respondents' Motion for Summary Judgment.

STATEMENT OF THE CASE

A. Factual Recitation.

Respondent IBP, inc. was, during the time of the proceedings in the District Court, a publicly held company with national and international operations in beef processing and distribution. IBP also had subsidiary operations in major segments of the frozen food industry, including manufacturing, distribution, and retail sales. One of IBP's

subsidiaries, Specialty Brands, Inc. ("SBI")[1], was a manufacturer and distributor of frozen Mexican foods that operated six manufacturing plants throughout the United States, one of which alone had the capability of producing more than 1.2 million burritos per day. Since at least 1995 – more than two years before representatives of IBP and Petitioner Luigino's first met to discuss possible acquisition terms – SBI had offered four different brands of frozen Mexican foods that were sold at retail in convenience stores, warehouse club stores, and grocery stores under the labels *Butcher Boy*, *Posada*, *Little Juan*, and *Marquez*. The undisputed evidence below showed that Luigino's top officers – including among others its President and its Vice President of Research and Development – acquired and sampled SBI's frozen Mexican food products at various times between 1996 and 1999, were aware that SBI was a subsidiary of IBP, and were aware that the acquired and sampled products were sold in retail settings. In fact, to the extent Petitioner describes the evidence of record below otherwise, *see* Petition at 14, it is wrong. The evidence of Luigino's purchases, samplings, and knowledge of SBI, its products, and the presence of those products in consumer retail markets was uncontroverted.

Long before Luigino's sent offering materials on the company to IBP, SBI decided in 1995 to embark upon a plan to consolidate its four brands for frozen Mexican

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[1] SBI was actually a subsidiary of Foodbrands America, Inc., which after 1996 was a subsidiary of IBP. Foodbrands operated as an autonomous subsidiary of IBP, updating IBP from time to time on all of the Foodbrands' operations. No SBI employee reported to anyone at IBP.

burritos, enchiladas, fajitas, chimichangas, and other Mexican food items into one single umbrella brand with stronger consumer recognition. Between 1997 and 1999, SBI continuously worked toward the goal of developing and launching this single, consolidated frozen Mexican food label by hiring employees with relevant experience in the frozen food industry, by conducting market research, and by preparing a comprehensive 10-chapter marketing plan. SBI's on-going independent development efforts on the unified brand for frozen Mexican foods were undertaken without considering any information from or on Luigino's.

Because IBP and its subsidiary operations participated in the food industry, when IBP and Luigino's representatives first met in 1998 to discuss Luigino's plan to sell the company, it was under the auspices of a Confidentiality Agreement. That agreement defined "confidential information" so as to specifically exclude from its purview "information developed independently by [IBP] employees who are not privy to" the disclosed information. Thus, from the outset of discussions between the companies, Luigino's recognized that IBP was in the food business and was developing products.

None of the materials exchanged between Luigino's and IBP in 1998 under this Confidentiality Agreement made mention of frozen Mexican food products. Nor was this omission of a particular ethnic food category a surprise. The record presented to the District Court was replete with undisputed facts on Luigino's explicit and unequivocal rejection, on several occasions, of a Mexican frozen food line. App. 37a. The record below was also laden with undisputed evidence of the complete distinction that

Luigino's drew between the Mexican and Southwestern food categories. App. 22a.

Discussions between the companies proceeded to the point in mid-1998 where IBP made an offer to acquire Luigino's, which was rejected with some scorn by Mr. Paulucci. Nevertheless, when Mr. Paulucci set out in late 1998 to comply with the requirement of the company's bondholders to establish a Board of Directors, he requested that Mr. Peterson join that newly-formed Board. In this manner, Mr. Paulucci could continue to market Luigino's to IBP. App. 3a. After accepting the directorship, Mr. Peterson completed a questionnaire needed for Luigino's bond offering. In that questionnaire, Mr. Peterson accurately stated that he did not regard IBP's food products as "competitive" with Luigino's, but explained that "IBP and its subsidiaries manufacture food products, however, none of these products directly compete" with Luigino's products. App. 19a.

Mr. Peterson attended three Luigino's Board meetings: April, 1999; July, 1999; and November, 1999. He never attended another Luigino's Board meeting, nor acted in any Board member capacity after 1999. Several Luigino's officers, employees, and representatives who attended one or more of the Board meetings at which Mr. Peterson was present were aware of IBP's presence in the frozen food retail market. *Howlin' Coyote*, a line of southwestern frozen chilies and salsas that Luigino's acquired in January 1999, was mentioned in the Board meeting minutes just once. As the District Court below found, any claim that a presentation was made to the Board of Directors on *Howlin' Coyote* or any plans to introduce a line of premium, frozen Southwestern (not Mexican) food under the *Howlin' Coyote* label was "dim" testimony or non-existent.

App. 20a. In fact, the evidence presented to the lower courts showed the *Howlin' Coyote* Business Plan was never shared with Luigino's Board of Directors. There was also no evidence that any information from the Board meetings was passed from Mr. Peterson to anyone at either Foodbrands or SBI.

By January, 2000 Mr. Paulucci had decided he was not going to "push[ ]" *Howlin' Coyote* that year because of a reluctance to spend the money on slotting fees. App. 23a. The first time Mr. Peterson learned of SBI's new umbrella brand, *José Olé*, was in February, 2000 when SBI presented a request for approval of capital expenditure to the IBP Board of Directors. App. 22a. SBI thereafter announced the launch of *José Olé* in April 2000. Twenty-one (21) of the twenty-six (26) products in the *José Olé* line are hand-held Mexican frozen foods such as those found in SBI's predecessor lines. The only new product offerings were five frozen food items packaged in bowls, a concept that was hardly new in the frozen food industry in 2000. Shortly after SBI launched the *José Olé* line in the retail foods marketplace, Nestle launched a new line of *Ortega* frozen Mexican food products. In June, 2000, in the face of advertising campaigns mounted by SBI and Nestle, Luigino's elected to pull *Howlin' Coyote* from the market. App. 23a.

B. Procedural Posture.

Luigino's filed its Complaint in July, 2000, asserting claims for breach of contract, breach of fiduciary duty, constructive trust, and misappropriation of trade secrets, all under Minnesota law. The District Court denied Luigino's Motion for a Preliminary Injunction in December, 2000. A

claim for negligent misrepresentation was thereafter added by amendment in 2001. The parties moved for summary judgment before the District Court in August, 2001. The District Court denied Luigino's Motion for Summary Judgment and granted IBP's Motion for Summary Judgment in an Order dated January 28, 2002. Luigino's took a timely appeal of that Order and Final Judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court in an Order dated January 30, 2003. The Eighth Circuit denied Luigino's Petition for Rehearing by Order dated April 1, 2003.

REASONS FOR DENYING THE WRIT

This case presents no decision of the Eighth Circuit Court of Appeals that is in conflict with the decision of another circuit court of appeals on an important matter. Indeed, the Eighth Circuit Court of Appeals panel reached its unanimous decision by relying only on and citing to decisions from that circuit or from Minnesota state courts. *See Luigino's Inc. v. IBP, inc.*, 317 F.3d 909 (8th Cir. 2003). No decisions from other circuits were cited in that opinion, let alone distinguished to support the unanimous outcome. Nor is there any important decision on a matter of federal law. In the end, this case is simply about whether the lower courts properly applied the Rule 56 summary judgment standard. That question is easily answered in the affirmative, particularly given the District Court's "extensive review of the record" in order to determine that summary judgment was "wholly appropriate." App. 41a. Petitioner's assertion that summary judgment was used improperly because factual disputes existed is both incorrect

and not the type of "compelling reasons" that justifies granting a Petition for Writ of Certiorari. Rather, this Petition falls squarely within the category of cases for which certiorari is rightly denied. Sup. Ct. Rule 10.

I. THE EIGHTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT WAS CONSISTENT WITH THE SUMMARY JUDGMENT STANDARDS OF *ANDERSON v. LIBERTY LOBBY; CELOTEX CORP. v. CATRETT*; AND *MATSUSHITA ELEC. INDUS. CO. LTD. v. ZENITH RADIO CORP.*

It is telling that Luigino's does not mention the specific basis for the lower courts' summary judgment ruling before page 13 of its Petition. Not once in the Questions Presented or Statement of the Case does Luigino's acknowledge that the basis on which the District Court granted summary judgment to IBP, and the Eighth Circuit Court of Appeals affirmed that judgment, was the absence of any evidence showing causation. As the District Court summarized, Luigino's failed "to assert facts that could support a finding of a causal link between any alleged impropriety and alleged damages. . . . The crucial facts of causation are fatally omitted from Plaintiff's case[.]" App. 40a-41a. The Eighth Circuit agreed: " . . . Luigino's failure to establish a genuine issue of material fact regarding causation defeats all of its claims." App. 9a.[2]

[2] In this respect, Luigino's does not accurately represent the basis for the appellate court's decision when it paraphrases that ruling in a fashion that fails to mention that the Court concluded after review of

(Continued on following page)

Thus, the sole basis on which summary judgment was granted on Luigino's state law claims was causation – an element that Minnesota law has long held is the plaintiff's burden to prove. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey*, 535 N.W.2d 671, 675 (Minn. Ct. App. 1996) (plaintiff must show that contract breach was proximate cause of damages); *Aries Info. Sys., Inc. v. Pacific Mgmt. Sys. Corp.*, 366 N.W.2d 366, 369 (Minn. Ct. App. 1985) (same – trade secret misappropriation); *Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 106 (Minn. Ct. App. 1987) (same – misrepresentation claim); *Lake Harriet State Bank v. Venie*, 165 N.W. 225, 228 (Minn. 1917) (same – breach of fiduciary duty claim). Even before the parties reached the District Court on IBP's Motion for Summary Judgment, that court identified a potential evidentiary void that could impede Luigino's ability to succeed on this fundamental element for each of Lugino's claims. In denying Luigino's Motion for a Preliminary Injunction (brought one year before the summary judgment motions), the District Court noted that "other factors" such as other competitors or Luigino's own business decisions could be the legal cause of any impact on Luigino's product lines. December 13, 2000 Order at 13.

One year later, when the parties returned to the District Court after completing a host of depositions, written discovery, and expert disclosures, IBP presented a record of undisputed facts drawn from the testimony of Luigino's witnesses and Luigino's documents that confirmed Luigino's had lost sales since the introduction of

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the record that Luigino's claims failed "for lack of causation[.]" *Compare* App.4a *with* Luigino's Petition at 7.

José Olé due to other products – newly introduced products and existing products in the marketplace – as well as Luigino's own business decisions. Among other undisputed facts, both Mr. Paulucci and Luigino's Executive Vice-President of Sales admitted in deposition testimony that product sales had been lost to products other than *José Olé*. Thus, the earlier potential evidentiary void became reality given that there was no evidence that any of IBP's conduct in bringing *José Olé* to market was the cause of any marketplace failure of Luigino's products. Each step of the way, the lower courts properly took facts and inferences in Luigino's favor but found this evidentiary void could not be filled. There was, for example, no evidence that IBP used any of the information Luigino's designated as "confidential," even where the lower courts considered the confidentiality issue in a light most favorable to Luigino's. App. 5a, 7a. The District Court also assumed that even where "Luigino's arguably knowingly and voluntarily facilitated" the alleged breach of contract, which in itself "created an issue of fact," even that dispute did not preclude summary judgment because the fundamental legal issue Luigino's failed to "address [was] a crucial element to its claim – an alleged causal link between the alleged breach and damages." *Id.* at 40a. Further, even accepting as true the existence of "superficial similarities" between the products, the lower courts recognized there was no evidence that those similarities existed "because IBP was exposed to confidential Luigino's information." App. 7a. In short, knowing the District Court's concern about the possible effect on Luigino's products of various unrelated factors, Luigino's presented no evidence that would have quantified the impact of those factors or distinguished the impact of those factors from any other causes for lost sales.

In addition to barely acknowledging the basis for the summary judgment ruling below, nowhere in its Petition does Luigino's point to *disputed facts* that could support a finding that its burden on causation could be met. Luigino's does not, for example, explain how Respondent Peterson's "state of mind" could be relevant to the issue of causation. Pet. Br. at 15.[3] Rather, Luigino's engages in the irrelevant exercise of illustrating alleged conflicts between the testimony of Mr. Peterson and the testimony of IBP's CFO as to whether Mr. Peterson told Mr. Shipley "about Luigino's *Howlin' Coyote* line," and thereafter describing the possible credibility assessments that could accompany this type of conflict – "demeanor and physical movements." Petition at 4. This is a wasted exercise because neither the "dispute" nor the "credibility" issues would support Luigino's burden on causation. Moreover, the District Court did, in fact, address this alleged "actual dispute" concisely and properly: "The only evidence Plaintiff points to is deposition testimony of Larry Shipley that states that Peterson told Shipley that Luigino's purchased *Howlin' Coyote*. As a matter of law, this communication, without more, however, is not a trade secret and cannot support an inference that Peterson somehow misappropriated certain proprietary information." App. 33a. In short, regardless of the credibility issues that Luigino's claims the difference in recollection between Mr. Peterson and Mr. Shipley generates, there is nothing in that scenario that could

[3] This omission is surprising in light of Luigino's characterization of Mr. Peterson's state of mind as "the case's central issue." Pet. Br. at 28. Surely if Mr. Peterson's state of mind was the sole basis on which Luigino's relies for causation, it could explain concisely how that "central issue" could be the *legal cause* of Luigino's damages.

have served as a platform for a reasonable jury to find in Luigino's favor on causation. For this reason, the District Court recognized after "extensive review" of the record that Luigino's failed to present undisputed facts identifying "which information was used, how it was used, and what circumstantial evidence within the *José Olé* line serves to indicate either[.]" App. 34a.

Longstanding, controlling law in Minnesota and the Eighth Circuit – predating even this Court's decisions in *Celotex*, *Liberty Lobby,* and *Matsushita* – recognizes that causation is a legal issue on which judgment can be entered as a matter of law. *See Elias v. City of St. Paul*, 350 N.W.2d 442 (Minn. Ct. App. 1984) (when plaintiff's evidence requires speculation as to causation, directed verdict is appropriate); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 895 (8th Cir. 1978) (directed verdict proper when testimony "was inadequate to provide anything more than a speculation as to the causation of plaintiff's alleged injury"). Here, the District Court and the Eighth Circuit Court of Appeals understood the relevant summary judgment standard, applied that standard by taking facts and inferences in Luigino's favor, and determined that Luigino's claims still failed as a matter of law on the legal issue of causation. App. 39a-40a.

Luigino's effort to match the outcome of this case to what it casts as the dire predictions of Justice Brennan's dissents in *Anderson* and *Celotex* is a misguided effort driven by inaccurate overgeneralizations. This case is not Justice Brennan's predictions come to life, nor is it a "classic example of judicial weighing of circumstantial evidence." Petition at 10, 13. The record presented to the District Court on IBP's Motion for Summary Judgment, hardly one of "little evidence," Petition at 10, was filled with

the admissions of Luigino's sales representatives, of the deposition testimony of Luigino's witnesses, and of Luigino's expert (who admitted he made no effort to quantify the effect on Luigino's sales of any factor other than *José Olé*) on multiple causes for Luigino's lost sales that had nothing to do with SBI, *José Olé*, or Mr. Peterson's short-lived tenure on Luigino's Board of Directors. Based on this evidence, and many other undisputed admissions by Luigino's, the district court correctly determined that summary judgment on Luigino's claims was "wholly appropriate" on just one crucial but fundamental issue: causation.

II. THE EIGHTH CIRCUIT'S DECISION AFFIRMING SUMMARY JUDGMENT ON THE ISSUE OF CAUSATION RAISES NO CONSTITUTIONAL ISSUE NOR A VALID SPLIT AMONG THE CIRCUITS, AND THEREFORE PRESENTS NO COMPELLING REASONS FOR GRANTING LUIGINO'S PETITION FOR CERTIORARI.

Luigino's Petition for Certiorari rests largely on an unfounded and misplaced attack on the work of the federal judiciary. Indeed, Luigino's denigrates the work of the federal judiciary in general, and the district court and the Eighth Circuit Court of Appeals in particular, when it characterizes decisions granting summary judgment as "paying lip service to the principles articulated" in this Court's 1986 trilogy of cases, as engaging in "activities that violate the 1986 trilogy," and as operating "in complete disarray and discord." Petition at 8, 10. This attack includes the overwrought generalization that "certain district courts and courts of appeals have flatly failed to apply" the trilogy's mandate and that lower courts employ

"an overly aggressive application" of the 1986 trilogy. *Id.* at 8, 27. This challenge is unwarranted, is inaccurate, and does not compel granting the Petition in this case. The record available to the District Court and the Eighth Circuit Court of Appeals was comprehensive, was the subject of extensive briefing (including a Petition for Rehearing to the appellate court), and was argued thoroughly before each court by competent counsel. Based on the record presented, both the District Court and an experienced panel of the United States Court of Appeals for the Eighth Circuit concluded that Luigino's presented no admissible evidence demonstrating a causal link between Mr. Peterson's brief tenure on Luigino's Board of Directors and any alleged harm Luigino's suffered as a result of the introduction of a frozen Mexican food line by a subsidiary of IBP. App. 5a-8a. The Panel's decision affirmed the District Court's decision on all of Luigino's claims – not on any disputed issues of intent or state of mind, but on the evidence or lack thereof on the element of causation. Luigino's claims failed because of an evidentiary deficiency on an element for which Luigino's alone bore the burden of proof but offered no evidence. The lower courts' opinions confirm that this case was precisely the type to which the Rule 56 summary judgment procedure was properly applied.

In arguing that summary judgment was used improperly here, Luigino's resorts to arguments and theories that were not advanced below. Not once below did Luigino's raise an issue regarding any alleged violation of the Seventh Amendment or Fed. R. Civ. P. 38. Not once below did Luigino's argue that a reasonable jury could find in its favor *on the issue of causation* based on evidence of alleged "past similar acts." Petition at 15. Indeed, Luigino's does

not explain even now how this inadmissible evidence from unrelated cases involving unrelated parties and unrelated products, even if plausibly characterized as genuine, material factual disputes, would allow a reasonable jury to find the requisite causal link between the alleged "bad acts" in this case and Luigino's alleged damages.

Next, in an effort to show a circuit split, Luigino's identifies two types of alleged inconsistencies within the circuits. First, Luigino's points to decisions from the Third and Sixth Circuits which upheld summary judgment for a defendant, in comparison to a decision from the Fifth Circuit, which reversed a summary judgment ruling for a defendant. Petition at 10-12. Second, Luigino's argues that the Eighth Circuit's decision is in conflict with the decisions of other circuits because the Eighth Circuit "did not correct the errors of the district court." Petition at 25. Neither of Luigino's scenarios is in fact a "circuit split," and neither scenario warrants granting the Petition in this case.

First, the fact that the circuit courts of appeals reach different outcomes in appeals from summary judgment rulings in different cases involving divergent claims (Section 1983 claim, vs. Jones Act claim, vs. fraud claim) with completely different factual records hardly rises to the level of a "circuit conflict." A circuit split warranting this Court's resolution is more often found in a difference in outcome based on differing views of the proper application of the same substantive law to similar facts. *See, e.g.*, *Moseley v. V Secret Catalogue*, 537 U.S. 418, 123 S.Ct. 1115, 1122 (2003) (granting certiorari to resolve circuit split on whether federal dilution claim requires evidence of actual harm); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992) (certiorari granted to address conflict between

federal circuit courts and state appellate court on application of Takings Clause to certain mobile home values). In other words, when this Court decides to grant certiorari in the case of a circuit split, it is to address different outcomes in cases involving the same claim and similar facts. The circuit split Luigino's envisions, however, is nothing more than different outcomes – primarily one with which Luigino's disagrees – in cases involving wholly unrelated claims and completely disparate facts.

More importantly, Luigino's presents this supposed circuit split based on no more than its assessment that the Third and Sixth Circuit cases were wrongly decided because the appellate courts upheld the summary judgment ruling, while the Fifth Circuit case was properly decided because that court reversed the summary judgment ruling. *See also* Petition at 25 (citing reversals of summary judgment rulings in favor of defendants due to misallocation of burden, or other alleged violations of summary judgment standards). Luigino's reaches these conclusions without the benefit of the complete record that was available to those courts, yet confidently announces the supposed legal errors or proper legal analysis drawn from those records. Petition at 11-12. At bottom, however, in the absence of a full review of the record, Luigino's assessment of which case was decided rightly or wrongly amounts to no more than a philosophical disagreement with the outcome when summary judgment is granted to defendants.

Second, Luigino's conclusion that a circuit split exists because it believes the Eighth Circuit failed to correct the lower court's errors (in contrast, apparently, to other circuit decisions which Luigino's concludes do correct errors) cannot be the definition of a circuit split. If Luigino's definition was

the correct statement of a circuit split, then virtually every decision with which the Petitioner disagreed would present this Court with a "circuit split." Rarely does the Petitioner concede that the lower appellate court ruling reflects something other than a failure to correct errors. Moreover, an alleged failure to correct errors is the type of case this Court deems "rarely" appropriate for a grant of certiorari. Sup. Ct. Rule 10. In addition, even if Luigino's form of analysis is correct, it appears the Eighth Circuit's decision was consistent with at least the First Circuit's decision in *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993). The *Hayes* decision, which Luigino's cites, also affirmed summary judgment on a causation issue. *Id.* Thus, even if an alleged failure to correct errors is a valid basis on which to position a "circuit split," in fact here there is no split on the one substantive issue present in this case: causation.

Finally, a circuit split cannot be predicated simply on which party, plaintiff or defendant, prevails. It is interesting to note, however, that Luigino's does not identify a summary judgment ruling for a defendant, dismissing a plaintiff's claims, that Luigino's believes was properly decided. Certainly a circuit split cannot be predicated simply on whether or not the outcome favors the plaintiff or defendant, *see* Petition at 25, yet this is apparently the form of analysis that Luigino's promotes.

Nor is there an intra-circuit conflict within the Eighth Circuit, as Luigino's suggests. Petition at 14. The Eighth Circuit's decision in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) cannot conflict with its decision upholding summary judgment on Luigino's claims in this case because the *Handeen* panel rested its decision on the movant's failure to present, at the outset, a *prima facie*

case that would warrant summary judgment. *Id.* at 1345-46. In other words, summary judgment could not be granted in *Handeen* even though the non-movant did not present a credible record of disputed facts because the movant "failed to meet the prefatory burden contemplated by Rule 56." *Id.* at 1346. This was not the record presented to the District Court here, nor available to the Eighth Circuit on appeal. Rather, as the opinions of both lower courts demonstrate, an active review of the record was undertaken to confirm that the Rule 56 standard for summary judgment was met.[4] *See* App. 4a-5a (considering claim of confidential information under more than one claim); App. 25a-40a (addressing each claim individually); App. 31a-32a (taking facts on trade secret claim in Luigino's favor).

Finally, no circuit split nor the "compelling reasons" required to grant a petition for certiorari can be predicated on the law review articles on which Luigino's relies. Even these commentators, including counsel on this Petition Arthur Miller, recognize that the summary judgment procedure is properly applied where a case lacks merit (as did Luigino's), where a dispositive issue is legal (as was the issue of causation here), or where the material facts were uncontroverted (as were the material facts on causation here). *See, e.g.*, Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49

[4] The district court in particular faced the challenge of perusing a "dense and complex" record only to find that Luigino's record citations were in fact not to be found in the record. *See, e.g.*, App. 16a at note 3; and, App. 20a at note 4.

Ohio State Law Journal 95, 135 (1988) (recognizing in historical overview of summary judgment procedure that Committee Reporter and "prime author" Clark "viewed rule 56 summary judgment as a device for adjudicating cases without trial when the material facts were not contested by either party to the dispute."); *Id.* at 140 ("To Clark, summary judgment is designed to eliminate cases in which the claimant 'has no case at all'[.]"); *Id.* at 192 (recognizing that summary judgment can be properly employed where non-movant's "case is so clearly non-meritorious that no reasonable fact finder would render a decision in its favor."); Note, *Summary Judgment and Circumstantial Evidence*, 40 Stanford Law Review 491, 492-93 (1988) (pointing out that alternative reading of *Matsushita* presents clear picture of judge and jury roles, and is consistent with opinion in *Anderson*); *Id.* at 512 (acknowledging that *Matsushita* holding recognizes that "the mere fact that an inference may be more probable than not is not enough to render the inference permissible."); *Id.* at 515 (recognizing that taking into account standard of proof is not the equivalent of weighing credibility); McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 Boston College Law Rev. 203, 247 (1993) (acknowledging that summary judgment is properly granted where the movant presents more than "mere assertions" and non-movant responds with "insufficient evidence for a reasonable jury to find in its favor.") (hereafter McGinley, *Credulous Courts*); Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U.L. Rev. 982, 1006 (2003) (acknowledging that Rule 16 is equivalent of "partial summary judgment" since district courts can dispose of

"frivolous claims in the course of a pretrial conference"); *Id.* at 1018 (acknowledging historical role of summary judgment in "clear-cut cases"); *Id.* at 1019 (acknowledging Supreme Court decision in 1902 that recognized validity of summary judgment procedure where "no disputed material facts and therefore no triable issues"); *Id.* at 1075 (acknowledging that no questions of "constitutional dimensions" are present where no genuine issue of material facts exists and movant is entitled to judgment as a matter of law); *Id.* at 1091 (acknowledging that summary judgment procedure reflects "a certain degree of tolerance for judicial control of the jury."); *Id.* at 1127 ("questions of law are the domain of judges and are admirably suited to resolution by pretrial motion.") (hereafter Miller, *Pretrial Rush*).

Furthermore, these law review commentators offer solutions to the problems they perceive to exist that are case-specific and therefore irrelevant here, or they offer no solutions at all. For example, one author recognizes only that the 1986 trilogy of summary judgment decisions requires "a concomitant reduction in the use of the Rule 50 procedures." Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Florida St. Law Rev. 689, 692 (1996); *Id.* at 710 (proposing modifications to Rule 50 practice). *See also* McGinley, *Credulous Courts*, at 209 (arguing that proper application of the summary judgment standard under the 1986 trilogy must take into account proper application of the *McDonnell Douglas* standard for discrimination cases); *Id.* at 243-255 (providing examples of revised standard for *McDonnell Douglas* in light of proper application of summary judgment standard); Issacharoff & Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73

(1990) (analysis of economic incentives for summary judgment).

Counsel on this Petition Miller argues that this Court "must provide some clarity" on summary judgment practice, Miller, *Pretrial Rush* at 1134, however does not explain in terms relevant to this case what that clarity would be and how that clarity would assist in not only this case but all other cases presenting a record of undisputed facts on the legal issue of causation. Even counsel Miller implicitly acknowledges that any after-the-fact analysis of the outcome of a summary judgment motion rests at some level of speculation. *See Id.* at 1097 ("appears" to have compromised jury trial right, motion "suggests" subject was trial worthy); *Id.* at 1098 (noting that the judge "probably sens[ed] difficulty" with the allocation undertaken); *Id.* at 1127 (noting that reader will have to "draw his or her own conclusions about the results" in the described cases). Speculation cannot, however, drive this Court's decision on a Petition for Writ of Certiorari.

Even if the speculative assumptions of these commentators could provide the basis for a grant of certiorari, nowhere has Luigino's demonstrated that those types of assumptions drove the lower courts' opinions here. Indeed, given the uncontroverted record before the lower courts, there is simply nothing in these articles that suggests the outcome in this case would have been any different even if the commentators' proposals were implemented or their assumptions were granted validity. Luigino's effort to align this case with the views of those who disagree with this Court's decisions in *Anderson*, *Celotex*, and *Matsushita* is a mismatched effort. The lower courts reached the correct outcome on the record

evidence. No amount of commentary on the 1986 trilogy of cases will change that outcome.

CONCLUSION

On the whole of the record, it is clear that this is not a case that warrants this Court's grant of a Petition for Certiorari. The Panel did not improperly weigh evidence or construe inferences against Luigino's. Rather, a thorough review of the claims and the record presented to the District Court and the Eighth Circuit Court of Appeals demonstrated a complete lack of evidence on a dispositive element on which Luigino's bore the burden of proof: causation. The lower courts followed this Court's 1986 trilogy of summary judgment decisions and reached the proper outcome on the record before it. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LUIGINO'S, INC.,

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v.

IBP, INC. and ROBERT PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, please refer to Petitioner's Petition for Writ of Certiorari, filed on June 30, 2003, for the appropriate disclosure.

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REPLY BRIEF FOR PETITIONER

I. THERE ARE COMPELLING REASONS FOR GRANTING CERTIORARI IN THIS MATTER.

This case falls squarely within the type of case for which certiorari should be granted.[1] As described in the Petition, this matter is an excellent example of the widespread variations and improper expansive use of Federal Rule of Civil Procedure 56, and the misinterpretation of this Court's decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), practices that, as in this case, intrude upon the

[1] Section II of Respondents' Opposition Brief focuses solely on the alleged deficiencies in Luigino's argument that the conflict between the Circuit Courts' application of Federal Rule of Civil Procedure 56 justifies a grant of certiorari. Br. Opp. pp. 12-21. Luigino's stands by the argument in its Petition and simply reincorporates it at this point. Luigino's, however, presented other grounds for a grant of certiorari throughout its Petition, including this Court's power and responsibility to assure the proper administration and application of Federal Rule 56, *see* Pet. pp. 8, 28, which is more fully discussed herein.

Seventh Amendment jury trial right.[2] The proper interpretation and administration of the Federal Rules (including Rule 56), which is critical for the proper functioning of the federal civil justice system, should command and has commanded this Court's attention on numerous occasions. *See, e.g., Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204 (1958)(certiorari is proper to resolve important questions as to the proper application of the Federal Rules); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706 (1927)(certiorari is appropriate on issues concerning the construction and application of the Federal Rules); *Matsushita, supra*; *Anderson, supra*; *Celotex, supra*; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 454 (1992)(granting certiorari to address the summary judgment standard in an antitrust controversy); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (granting certiorari to address the summary judgment standard in a race discrimination case involving burden shifting); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002)(granting certiorari to address Federal Rule 8 pleading requirements); *Conley v. Gibson*, 355 U.S. 41, 44, 47-48 (1957)(same); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964)(granting certiorari to address Federal Rule 35 physical and mental examinations); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 4 (1941)(granting certiorari to address the validity of Federal Rules 35 and 37). *See also* 28 U.S.C. § 2072(a)(this Court has the power to prescribe general rules of practice and procedure for cases in the district courts and courts of appeals)

The use of certiorari is particularly appropriate when the application of a Rule implicates important matters such as the ability to reach trial and the right to trial before a jury. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1958) this

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[2] Contrary to the assertion at Br. Opp. pp. 1, 13, Luigino's has consistently maintained throughout the summary judgment proceedings and on appeal that Luigino's claims should have been submitted to a jury.

Court granted certiorari and stated:

> We grant certiorari . . . because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'

Id. at 501(quoting *Dimick v. Schiedt*, 293 U.S. 474 (1935)). These cases make it clear that there are compelling reasons for this Court to grant certiorari in this matter.

II. THE ARGUMENTS IN RESPONDENTS' BRIEF IN OPPOSITION ACTUALLY SUPPORT GRANTING CERTIORARI IN THIS CASE.

Predictably, Respondents devote much of their Brief in Opposition trying to convince the reader that there are no genuine issues of material fact or evidence of causation and, thus, summary judgment was proper. In their view, this Court need not concern itself with the application of *Matsushita*, *Anderson*, and *Celotex*, or the administration of Rule 56, by the federal courts. They do this first by their inaccurate statement of facts and then by their bald—but false—assertion that Luigino's presentation on the causation issue was properly decided as a matter of law because Luigino's failed to present any evidence on the point. Both techniques are designed to obscure the compelling reasons for granting Luigino's Petition.

A. The inaccuracies in Respondents' statement of facts demonstrate that this matter should not have been adjudicated on summary judgment.

Respondents' Statement of Facts mischaracterizes the facts and certainly does not construe all inferences in favor of Luigino's. Yet, it does show that there were genuine issues of material fact that should have precluded the entry of summary judgment. For example, Respondents' Brief

incorrectly maintains that it was undisputed that Luigino's did not want to enter into the market for "Mexican" retail branded frozen entrées, and that *Howlin' Coyote* was "Southwestern," which Luigino's sharply distinguished from Mexican. Br. Opp. pp. 3-4. Clearly, however, the presentation given to Luigino's Board in July, 1999, which apparently was discounted by the district court (*see* App. 20a), unequivocally demonstrated that Luigino's was pursuing its *Howlin' Coyote* line, which Luigino's considered to be a premium subset of Mexican. This issue was critical to whether Mexican retail branded frozen entrées was a corporate opportunity of Luigino's, which Luigino's was required to show prior to the burden shifting to Respondents under Minnesota law. *Miller v. Miller*, 222 N.W.2d 71, 82 (Minn. 1974); *Honn v. Coin & Stamp Gallery, Inc.*, 407 N.W.2d 419, 422-23 (Minn. App. 1987). The district court should have considered this fact and resolved inferences arising from it in favor of Luigino's.

Respondents also incorrectly maintain that Luigino's knew that IBP's Mexican products were sold at retail. Br. Opp. pp. 2. Although some IBP products were sold in certain retail outlets such as convenience stores, IBP did not sell its products in the frozen entrée section of grocery stores and supermarkets. Further, during the negotiations for the potential purchase of Luigino's, IBP repeatedly maintained that it was not in the same business at Luigino's. Thus the record on the summary judgment motion presented a triable issue on the material fact of Luigino's knowledge.

Finally, Respondents incorrectly state that the plans for *Howlin' Coyote* discussed at Luigino's July, 1999, Board meeting were either truncated or non-existent. Br. Opp. pp. 4-5. There was record evidence, however, including the testimony of Larry Nelson that demonstrates that a detailed PowerPoint presentation was given at the Board meeting, which the district court improperly characterized as "dim" (*see* App. 20a). This issue was material because, in order to

show corporate usurpation or misappropriation, Luigino's must have introduced evidence that Peterson or IBP was exposed to Luigino's plans for *Howlin' Coyote*.

These are some of many examples[3] of the district court improperly weighing evidence, drawing inferences in favor of Respondents, rather than in favor of Luigino's, and failing to acknowledge the existence of genuine issues of material fact.[4] By repeating this improper process, Respondents are perpetuating the errors committed below. Ironically, this graphically illustrates why guidance on the application of Rule 56 is so needed from this Court at this time.

B. Luigino's has introduced ample evidence of causation on its claims against respondents.

Respondents attempt to get this Court to believe that Luigino's **sole** evidence of causation was the existence of similar conduct involving two third parties, C&F Packing Co. and Don Miguel.[5] Br. Opp. p.10. This is simply wrong and disregards the following evidence supporting causation:

1. Prior to the contract between IBP and Luigino's that gave rise to this litigation, and up until *José Olé* was launched in spring, 2000, IBP, through its subsidiary, SBI, sold various low-end hand-held Mexican products through its Posada, Little Juan, Marquez, and Pacific Tortilla Kitchen lines. Those products included individually wrapped

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[3] Unfortunately, page limitations do not permit a detailed analysis of all of Respondents' factual inaccuracies in their Brief.

[4] This also shows the injustice of the lower courts' apparent acceptance of "trials by affidavit" in complex cases, where the facts are left to counsel's "spin" in briefs—with no opportunity to cross-examine the witnesses before the factfinder.

[5] Respondents also mistakenly assert that Luigino's sole evidence of causation is the disparity between the testimony of Peterson and IBP'S CFO regarding whether Peterson told anyone at IBP about Luigino's. Br. Opp. p. 10, n 3.

burritos, wraps, chimichangas, and packaged taquitos, and were primarily sold in the "foodservice" distribution channel. Neither IBP nor SBI ever sold those products in the separate market known as retail branded frozen entrée products in the frozen entrée section of grocery stores and supermarkets.

2. In early 1998, IBP, through SBI, decided to repackage its various low-end, hand-held products under an umbrella brand. These plans did not contemplate the entry into the retail branded frozen entrée market in grocery stores and supermarkets.

3. In 1998, in connection with the potential purchase of Luigino's, IBP was exposed to Luigino's Confidential Memorandum, which detailed trade secret, confidential and/or proprietary information regarding Luigino's lines of retail branded frozen entrée products sold in the frozen entrée section of grocery stores and supermarkets.

4. In January 1999, Peterson joined Luigino's Board of Directors. Peterson deposed that he did not do so to assist Luigino's in its operations, but rather to benefit IBP.

5. During Luigino's July, 1999, Board meeting, Peterson was exposed to Luigino's trade secret, confidential and/or proprietary plans for *Howlin' Coyote*, a premium line of Mexican/Southwestern retail branded frozen entrée products to be sold in grocery stores and supermarkets. Peterson was informed, among other things, of Luigino's discovery that there was a void in the market for a line of premium Mexican and/or Southwestern retail branded frozen entrée products sold in grocery stores and supermarkets, and that there was a consumer desire for such a product line. Peterson was informed of how Luigino's would capture this market, during the July, 1999, Board meeting and in subsequent mailings.

6. In October, 1999, less than three months after Peterson was informed of Luigino's plans for *Howlin' Coyote*, IBP prepared a Request for Appropriation for $8

million to develop a new premium Mexican brand to be sold in the retail, branded frozen entrée section of grocery stores and supermarkets, a completely new market for IBP.

7. At no time did Peterson inform Luigino's about the existence of or impending launch of *José Olé*.

8. *José Olé* was launched in the spring of 2000. Many of the new *José Olé* frozen branded retail entrée products are literally identical to the *Howlin' Coyote* products presented to Peterson at Luigino's July, 1999, Board meeting.

9. *José Olé* is sold side by side with Luigino's products in the frozen entrée section of grocery stores and supermarkets.

10. Luigino's frozen food industry expert opined that IBP probably used the information it learned from Luigino's, including the consumer acceptability of premium Mexican entrées and the importance of being a first mover in the market, to develop and launch the *José Olé* line.[6]

11. When questioned about whether he told anyone at IBP about Luigino's *Howlin' Coyote* plans, a question highly relevant to causation, Peterson deposed that he did not disclose anything about *Howlin' Coyote* to anyone at IBP. IBP's CFO, however, testified exactly to the contrary.

12. On two occasions, IBP was accused of misappropriating food industry intellectual property or trade secrets; one resulted in a $10.9 million judgment against IBP and the other involved IBP's *José Olé* logo. Pet. pp. 5-6, n 2.

This evidence, when viewed in is entirety as should be done on a summary judgment motion, rather than in bits and pieces (*see, e.g., Matsushita*, 475 U.S. at 587; *In re: High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 657 (7th

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[6] The district court refused to consider the testimony of experts in ruling on the summary judgment motions. App.15a, n 2.

Cir. 2002); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 505 (6th Cir. 1996); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993), would have allowed reasonable jurors to find in favor of Luigino's on the issue of whether Respondents' acquisition of Luigino's trade secrets and/or confidential information wrongfully assisted IBP's launch of *José Olé*. *See also Wager v. Hall*, 83 U.S. 584, 601-602 (1872)(direct proof of fraudulent acts is not common and circumstantial evidence that may be inconclusive if separately considered, may be sufficient if considered together to constitute conclusive proof, especially when corroborated by moral coincidences). This is reinforced by the fact that, under Minnesota law, causation is generally an issue of fact, and, being the governing law, should have been applied by the courts below. *See, e.g., Commercial Property Investments, Inc. v. Quality Inns, Int'l, Inc.*, 938 F.2d 870, 878 (8th Cir.1991); *Raach v. Haverly*, 269 N.W.2d 877, 880 (Minn. 1978); *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286, 290 (Minn. App. 1997); *Hamilton v. Independent School Dist. No. 114*, 355 N.W.2d 182, 184 (Minn. App. 1984).

Finally, Respondents contend that Luigino's failed to show causation because it did not show that it lost sales due to IBP's launch of *José Olé*. Br. Opp. pp. 8, 9. This is incorrect for two reasons. First, in a corporate usurpation setting, damages need not be computed by determining the amount of sales lost. The damages may be the value of the thing taken. *See, e.g., Diedrick v. Helm*, 14 N.W.2d 913, 921 (Minn. 1944)(the aggrieved corporation may seek a money judgment for the value of the thing diverted); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. Sup. Ct. 1939)(the law imposes a constructive trust for the corporation's benefit that "does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence"); 19 C.J.S. Corporations § 510 (1990)(when a director breached the fiduciary duty, "it is immaterial that the corporation was not damaged by the transaction").

Second, and more importantly, the district court's finding that Luigino's did not introduce evidence of causation was not based on Luigino's alleged failure to show that *José Olé* caused Luigino's damages, to the exclusion of other factors. Rather, it was based on its conclusion, resulting from its improper factfinding, that there was no evidence of a causal connection between Respondents' acquisition of Luigino's trade secrets and/or confidential information and the launch *José Olé*. App. 15a, n 2.[7]

III. THE LOWER COURTS DID NOT PROPERLY SHIFT THE BURDEN OF PROOF TO RESPONDENTS ON LUIGINO'S CLAIM FOR CORPORATE USURPATION.

Not surprisingly, Respondents do not address the fact that, under Minnesota law, the burden of persuasion to show good faith shifted to Respondents after Luigino's introduced evidence that Peterson had a duty to Luigino's and that Luigino's had the capacity to enter into the retail market for premium Mexican and/or Southwestern frozen entrées sold in grocery stores and supermarkets. *See Miller*, 222 N.W.2d at 82 (Minn. 1974); *Honn*, 407 N.W.2d at 422-23 (Minn. App. 1987). This is critical because, under Minnesota law, Luigino's need not prove "causation" (i.e., evidence of a causal connection between the acquisition of Luigino's trade secrets and/or confidential information and the launch *José Olé*) to establish liability for Respondents' corporate usurpation. If the corporation seeks a money judgment for the value of what was usurped, "[i]t makes no difference . . . that the corporation's assets were misused . . . ." *Diedrick*, 14 N.W.2d at 921. Although a burden of persuasion topic of Minnesota law, this issue is critical to the proper administration of Rule 56.

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[7] Most of the direct evidence of this causation element was in the sole possession of Respondents.

Federal courts must follow the forum state's substantive law in diversity cases. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As this Court has held, a federal court must follow that state's burdens of persuasion, *see Palmer v. Hoffman*, 318 U.S. 109, 116 (1943), and view the evidence presented on a summary judgment motion through the prism of the applicable evidentiary burden, *Anderson*, 477 U.S. at 254. Minnesota substantive law regarding corporate usurpation required shifting the evidentiary burden to the Respondents to show good faith, because Minnesota law recognizes that most or all of the evidence needed by a plaintiff to show bad faith is likely to be in the defendant's possession or control. *Miller*, 222 N.W.2d at 82. The courts below clearly misapplied the teachings of *Palmer* and *Anderson*. This Court should make clear that the issue of whether genuine issues of fact exist must be evaluated not only through the applicable evidentiary burden, but also by following the state's burden shifting analysis, especially when that reflects the forum state's judgment regarding a matter of substantive law of policy. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-28 (1996).

CONCLUSION

For the foregoing reasons and those stated in the Petition, its is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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